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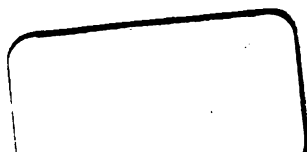
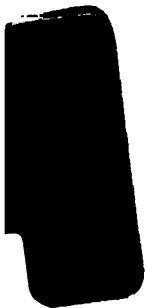
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A

PRACTICAL TREATISE

ON

THE LAW OF TRUSTS.

BY
(THE LATE)
THOMAS LEWIN, ESQ.

Eighth Edition

BY
FREDERICK A. LEWIN.

FIRST AMERICAN, FROM THE EIGHTH ENGLISH, EDITION

BY
JAMES H. FLINT.

VOLUME I.

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PREFACE TO THE AMERICAN EDITION.

THE accurate and exhaustive treatise of Mr. Lewin can receive no warmer nor more effective commendation than that which voluntarily or unconsciously falls from the lips of every reader.

The English cases have been brought down to date, and this part of the work has been excellently done by a F. Heard, Esq.

The text has been modified and corrected as indicated in the "addenda et corrigenda" of the eighth English edition.

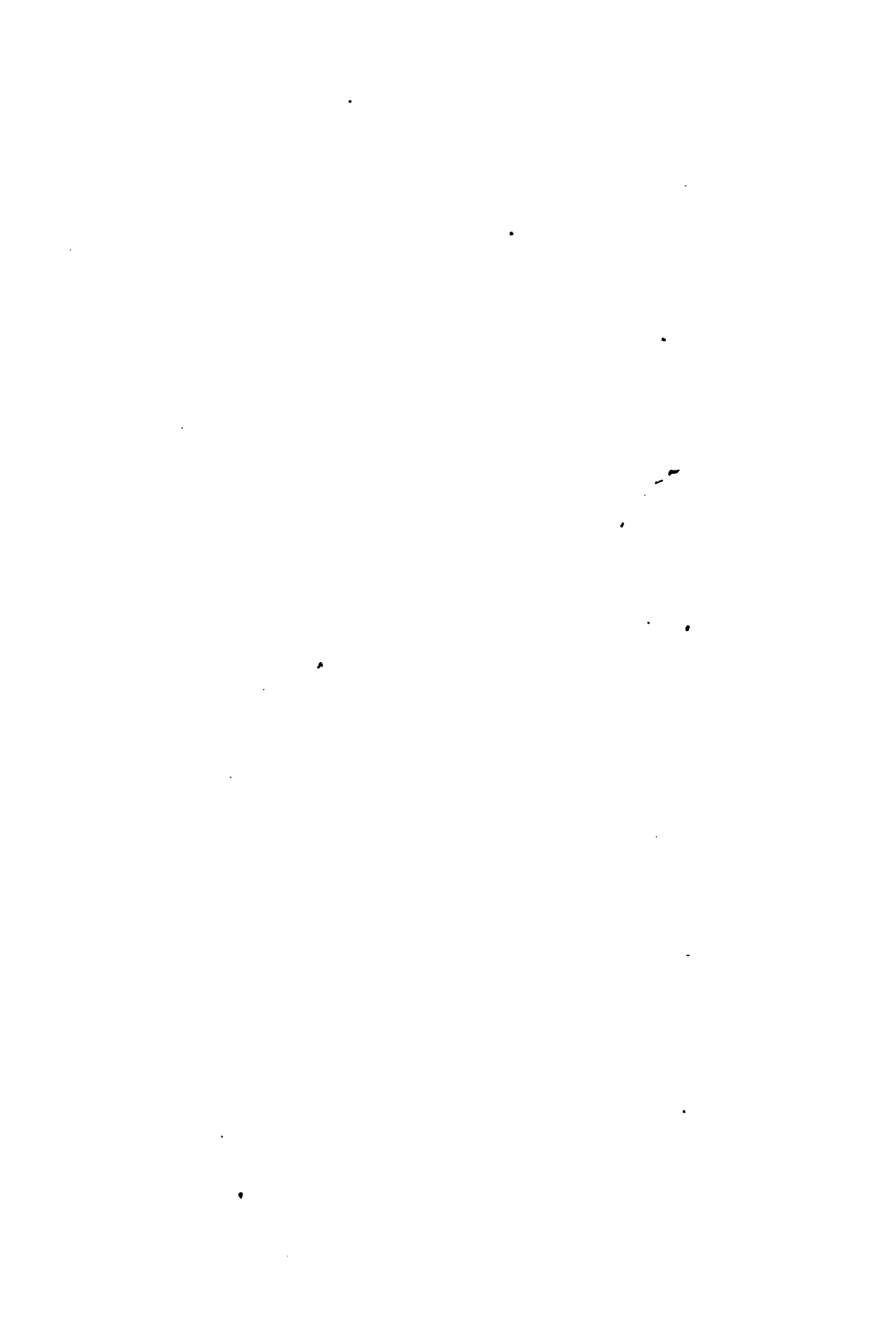
In the American notes the attempt has been made to show the difference between English and American decisions, to cite the leading cases upon the subjects treated and to briefly indicate the substance of the decisions.

To know where knowledge is, is next to having it, and, if the reader finds his attention directed to such cases as he seeks, his perusal of them renders any lengthy abstracts or quotations unnecessary.

In so far as these annotations are found numerous, accurate and comprehensive enough to afford any assistance, to that extent it will be felt that this labor has not been in vain.

J. H. F.

Boston, May, 1888.



PREFACE.

SINCE the publication of the last Edition of this work several important Acts of Parliament have been passed, which have given rise to numerous, and in many cases fundamental, changes in the law as affecting the relative positions of trustees and their cestuis que trust, and their respective rights and powers. These, together with the continual modifications in the law arising from the flow of cases through the Courts, have caused a considerable increase in the size of the present Edition.

One new chapter and an additional section to another chapter have been introduced, pointing out the principal provisions of the Settled Land Acts as they affect the law of trusts, but a general consideration of these Acts does not seem to fall within the purview of the present work.

With the above exception, I have not altered the form of the work, but while dealing with the late Conveyancing Acts, and the Married Woman's Property Act, 1882, and the other variations in the law which have arisen since the last Edition, I have endeavoured as far as possible to weave the new matter in and make it harmonize with the previous text.

An important feature in the present Edition is the

index which has been remodelled and much enlarged by Mr. C. C. M. Dale, of the Chancery Bar, whose skill in this work is well known, and to whom I am much indebted for the care and labor which he has bestowed upon it.

As in the previous Edition the matter introduced by the present Editor is distinguished by being enclosed in square brackets [].

The Addenda are again considerable, but it is not possible to avoid this, without passing over important decisions reported while the work is in the press.

August, 1885.

F. A. L.



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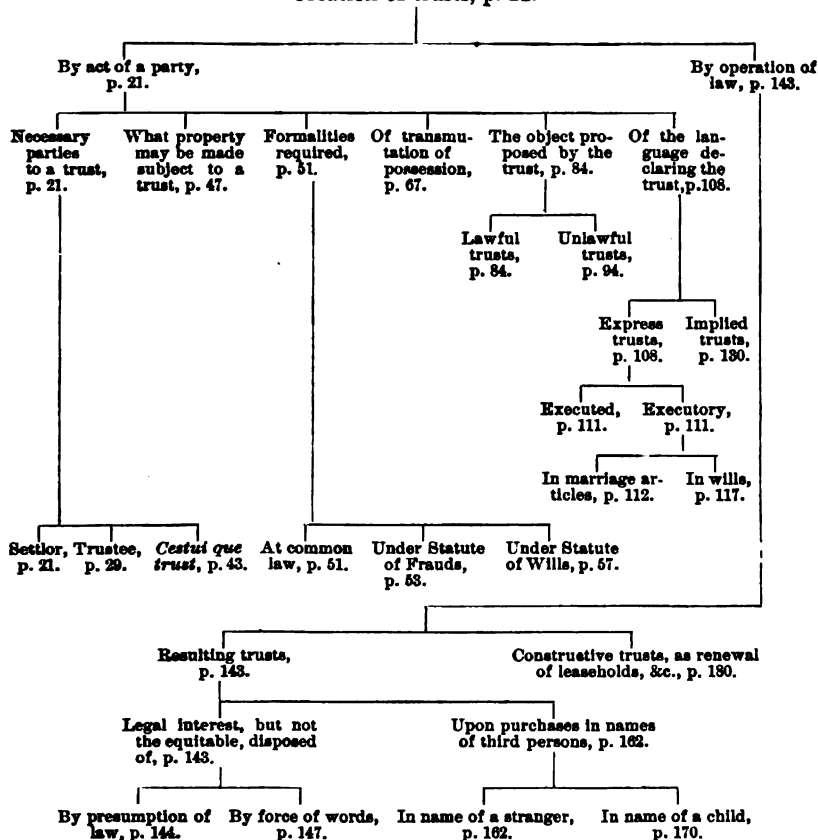
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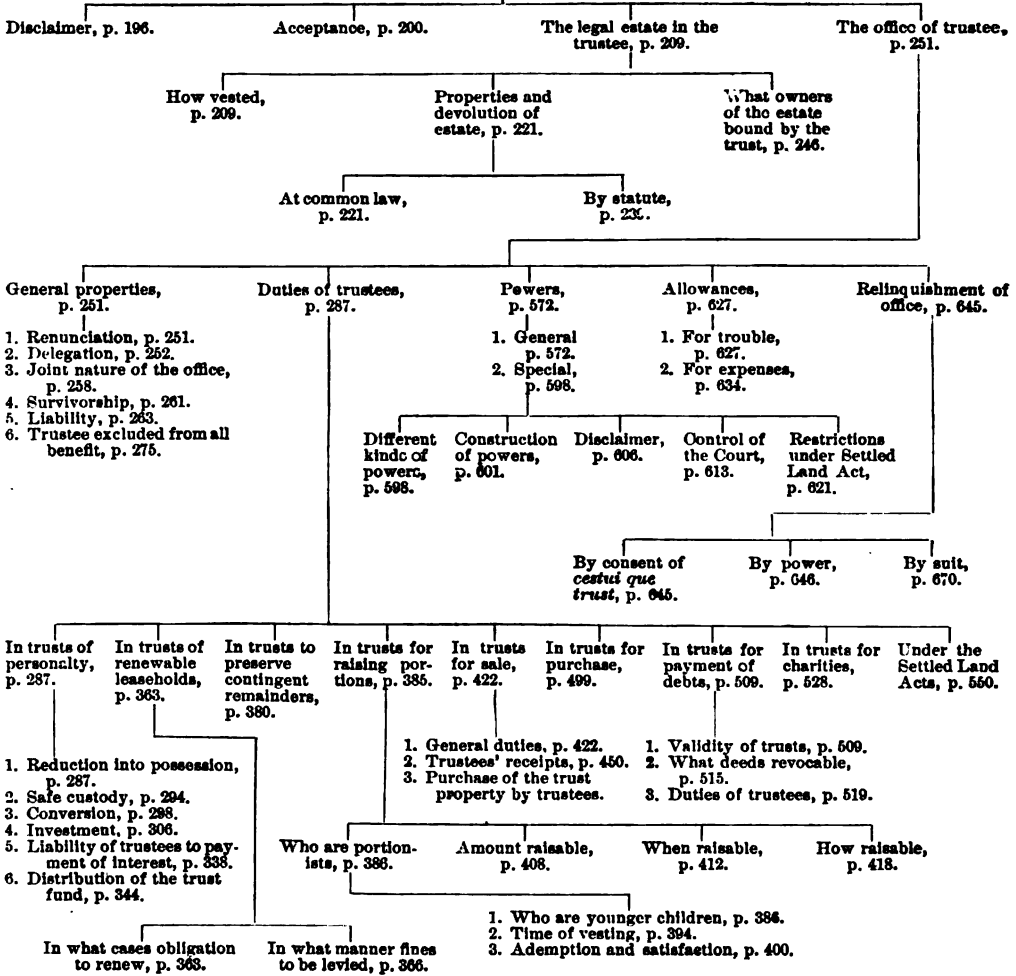
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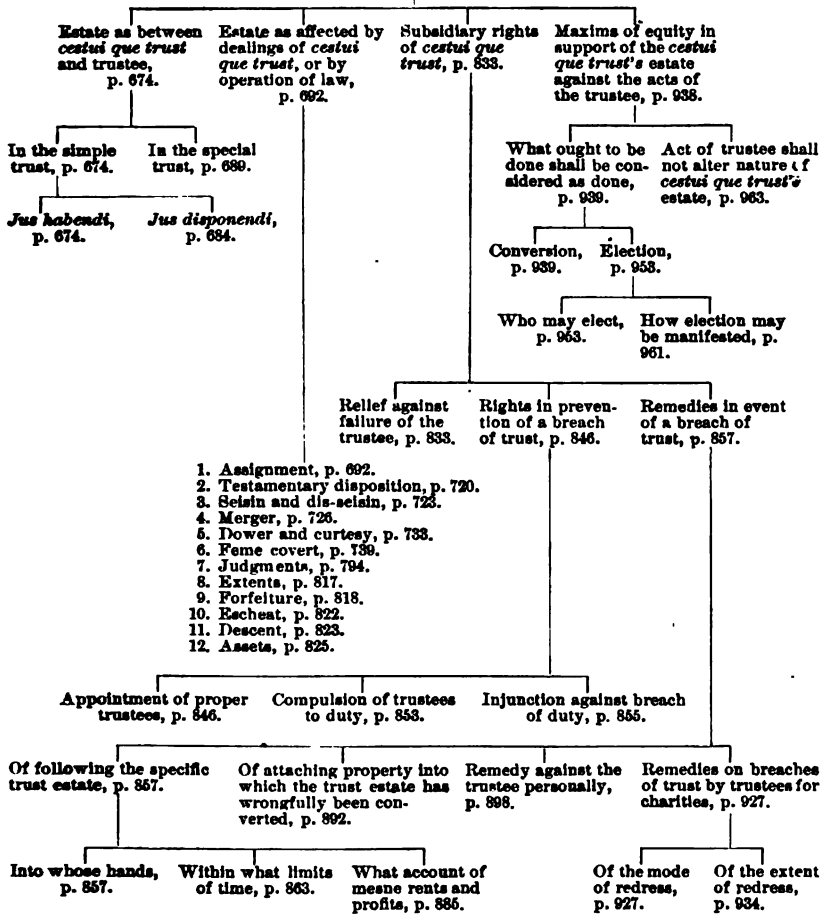
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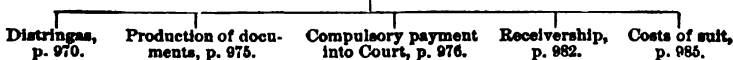
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INTRODUCTORY VIEW

OF THE

RISE AND PROGRESS OF TRUSTS.

Origin of trusts. — The origin of trusts, or rather the adaptation of them to the English law, may be traced in part at least to the ingenuity of fraud. By the interposition of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to evade the restrictions directed against the growing wealth of the church by the statutes of mortmain. Another inducement to the adoption of the new device was the natural anxiety of mankind to acquire that free power of alienation and settlement of their estates, which, by the narrow policy of the common law, they had hitherto been prevented from exercising.

The subpoena. — Originally the only pledge for the due execution of the trust was the faith and integrity of the trustee; but the mere feeling of honour proving, as was likely, when opposed to self-interest, an extremely precarious security, John Waltham, Bishop of Salisbury, who was Lord Keeper in the reign of Richard the Second, originated the writ of *subpœna*, by which the trustee was liable to be summoned into Chancery, and compellable to answer upon oath the allegations of his *cestui que trust*. No sooner was this protection extended, than half the lands in the kingdom became vested in feoffees to *uses*, as trusts were then called. Thus, in the words of an old counsellor, the *pa- [*2]
rents of the trust were Fraud and Fear, and a Court of Conscience was the Nurse (a).

(a) Attorney-General v. Sands, Hard. 491.

Trusts simple or special. — Simple trust defined. — Of trusts there were two kinds: the *simple* trust, and the *special* trust. The *simple* trust was defined in legal phraseology to be, “a confidence, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* should take the profit, and that the terre-tenant should execute an estate as he should direct” (b). In order rightly to understand what was meant by this rather technical description, we shall briefly consider the principles that were recognised by Courts of Equity (for these had the exclusive jurisdiction of trusts), First, with reference to the terre-tenant or feoffee to uses, and Secondly, with reference to the beneficial proprietor, or *cestui que use*.

Confidence in the person. — With respect to the feoffee to uses, it was first held to be absolutely indispensable that there should be *confidence in the person*, and *privity of estate*. For want of the requisite of *personal confidence* it was ruled that a *corporation* could not stand seised to a use; for how, it was said, could a corporation be capable of confidence when it had not a *soul*? Nor was it competent for the *king* to sustain the character of trustee; for it was thought inconsistent with his high prerogative that he should be made responsible to his own subject for the due administration of the estate. And originally the *subpœna* lay against the trustee himself only, and could not have been sued against either his *heir* or *assign*; for the confidence was declared to be personal, and not to accompany the devolution of the property (c). But the doctrine of the Court in this respect was subsequently put on a more liberal footing, and it came to be held that both heir and assign should be liable to [*3] the execution of the use (d). An exception * however was still made in favour of a purchaser for valuable consideration not affected by notice (a).

Privity of estate. — The meaning of *privity of estate* may

(b) Co. Lit. 272, b.

(c) 8 E. 4. 6; 22 E. 4. 6.

(d) The law as to the heir was

altered by Fortescue, Ch. J. Bac. Ab. Uses and Trusts B.

(a) Bac. Ab. Uses and Trusts B; and see 14 H. 8. 4, 7, 8.

be best illustrated by an example. Had a feoffment been made to A. for life to his own use, with remainder to B. in fee to the use of C., and then A. had enfeoffed D. in fee, in this case, though D. had the land by the feoffment which then operated as a tortious conveyance, yet, as he did not take the indentical estate in the land to which the use in favour of C. was attached, he was not bound by C.'s equitable claim. And, by the same rule, neither tenant by the *curtesy*, nor tenant in *dower*, nor tenant by *elegit*, was liable to the execution of the use, for their interests were new and original estates, and could not be said to have been impressed with the use. So the lord who was *in* by *escheat*, a *disseisor*, *abator*, and *intruder*, were not amenable to the *subpœna*; for the first claimed by title paramount to the creation of the use; and the three last were seised of a tortious estate, and held adversely to the feoffee to uses.

Privity as regards the cestui que use. — With respect to the *cestui que use*, the principle upon which his whole estate depended was also what in legal language was denominated *privity*. Thus, on the death of the original *cestui que use*, the right to sue the *subpœna* was held to descend indeed to the *heir* on the ground of *hæres eadem persona cum antecessore*; but the wife of the *cestui que use*, or the husband of a feme *cestui que use*, and a judgment creditor were not admitted to the same privilege; for their respective claims were founded not on privity with the person of the *cestui que use*, but on the course of law. And for the like reason a use was not assets, was not subject to forfeiture, and on failure of heirs in the inheritable line did not escheat to the lord.

Special trust defined. — The *special* trust (for hitherto we have spoken of the simple trust only) was where the conveyance to the trustee was to answer some particular and specific purpose, as upon trust to reconvey in order to change the line of *descent, upon trust to sell for payment of debts, &c. In the special trust the duty of the trustee was not, as in the simple trust, of a mere passive description, but imposed upon him the obligation of exerting himself in some active character for the accomplishment of

the object for which the trust was created. In case the trustee neglected his duty, the *cestui que trust* was entitled to file a bill in Chancery, and compel him to proceed in the execution of his office (a).

Trusts applicable to chattels.—Both the *simple trust* and the *special trust* were applicable to *chattels* real and personal, as well as to freeholds; but trusts of chattels were for obvious reasons much less frequently employed. The amount of the property was small; the owner, even without the interposition of a trustee, had the fullest control and dominion over it; and a chattel interest, as it followed the person, was equally subject to forfeiture whether in the custody of a trustee, or in the hands of the beneficial proprietor (b). But to the extent, whatever it was, to which trusts of chattels were adopted, they were administered upon the same principles, *mutatis mutandis*, as were trusts of freeholds; the right to sue a *subpœna* turned equally on privity (c), and the interest of the *cestui que trust* was held not to be assignable (d).

Statutes affecting trusts.—Such was the nature of trusts as they stood at *common law*; but the manifold frauds and mischiefs to which the new system gave occasion, particularly “the great unsurety and trouble arising thereby to purchasers,” called loudly from time to time for the enactment of remedial statutes. One of the most important of these was 1 Ric. 3, c. 1, the substance of which may be well expressed in the terms of the preamble, viz., that “all acts made by or against a *cestui que use*, should be good as against him, his heirs, and feoffees in trust,” in other words, that all dealings of the *cestui que use* with the trust property [*5] should have precisely *the same legal operation, as if the *cestui que use* had himself possessed the legal ownership. To what interests the legislature intended this statute to apply has not on all hands been agreed. A feoffment in *fee* to uses was clearly the case primarily intended. Upon a feoffment in *tail*, it seems no use could have been

(a) See the case in the reign of Hen. 7. Append. to Sugden on Powers, No. 1.

(b) 5 H. 5. 3, 6.

(c) Witham's case, 4 Inst. 87.

(d) Jenk. 244, c. 30.

declared, for a tenant in tail was incapacitated by the statute *de donis* from executing estates (a). With respect to a feoffment for life to uses, there appears to be no reason upon principle (except so far as the language of the act may be thought to furnish any inference), and certainly there is no objection on the score of authority, why the *cestui que use* might not have passed the legal estate by virtue of the statutory power. It has been contended by Mr. Sanders, that on a feoffment for life no use grafted on the life estate could have been declared, on the ground that as the tenant for life held of the reversioner, the consideration of tenure would have conferred a title to the beneficial interest on the tenant for life himself (b). But this reasoning can have no application where the estate for life was not *created*, but was merely *transferred*, for then the assignment of the life estate was not distinguishable in this respect from a conveyance of the fee; in each case there was no consideration of tenure as between the grantor and grantee, but in each case the services incident to tenure were due from the grantee to a third person (1). It is clear that the statute embraced *uses of lands* only, and did not extend either to *special trusts*, or to *trusts of * chattels*: not to special trusts, [*6] because the trustee combined in himself both the legal estate and the use, though compellable in Chancery to direct them to a particular purpose; and not to trusts of chattels, because the preamble and the statute were addressed to *cestui que use* and *his heirs*, and to *feoffees in trust*.

(a) Co. Lit. 19, b.

(b) Sand. on Uses, c. 1, s. 6, div. 2.

(1) **In what case a use might have been declared upon an estate for life.** — The state of the law upon this subject appears to have been as follows: — (1). On the *creation* of an estate for life, had no use been mentioned on the face of the instrument, the tenant for life had held for his own benefit in compensation for his services: Perk. s. 535; B. N. C. 60; Br. Feff. al. Uses, 10; and no use could have been *averred* in contradiction to the use implied. See Gilb. on Uses, 57. (2). Had a use been *expressly* declared by the deed, the tenant had been bound by the terms on which he accepted the estate: Perk. s. 537; Br. Feff. al. Uses, 10, 40; (3), unless a rent had been reserved, or consideration paid, in which case a court of equity would not have enforced the use against the purchaser for valuable consideration: B. N. C. 60; Br. Feff. al. Uses, 40. (4). On the *assignment* of a life estate a use might have been declared, as on a conveyance in fee.

27 H. 8. c. 10. — The mischiefs of the system increasing more and more (the statute of Richard occasioning still greater evils than it remedied, from the facility it gave to the *cestui que use* and his feoffee, who had now each the power of passing the legal estate, of defrauding by collusion the *bonâ fide* purchaser), the legislature again interposed its authority by 27 Hen. 8. c. 10, and thereby annihilated uses as regarded their fiduciary character, by enacting, that "Where any person stood *seised* of any hereditaments to the use, confidence, or trust of any other person, or of any body politic, such person or body politic as had any such use, confidence, or trust, should be deemed in lawful *seisin* of the hereditaments in such like estates as they had in use, trust, or confidence" (1).

Special trusts and trusts of chattels excepted from the statute. — *Uses* by the operation of this statute became merged in the legal estate; but *special trusts* and *trusts of chattels* were not within the purview of the Act: the former, because the use, as well as the legal interest, was in the trustee; the latter, because a termor is said to be *possessed*, and not to be *seised* of the property.

[*7] * **Introduction of the modern trust.** — In the room of uses which were thus destroyed as they arose,

(1) **Objections to the doctrine that no use could have been declared upon an estate in tail or for life.** — As this statute *does* operate on the use of a life estate, but does *not* apply to a *seisin* in tail, the doctrine of Mr. Sanders, that prior to 27 Hen. 8. there was no use of a *seisin* either in tail or for life, seems open to the following objections: — 1. That the statute in executing the use of a life estate operates on an interest which at the time of the enactment had no existence; and, 2ndly, that in *not* executing a use declared on a *seisin* in tail, it operates differently on two estates falling, according to his view, within the same principle. To meet the former objection, Mr. Sanders holds the statute of Hen. 8. to be prospective, and distinguishes it from the statute of Richard, which he considers not to be prospective, by observing that the latter employs the word "*use*" only, while the former has the additional term of "*trust*"; but to this it may be answered, that, although the statute of Richard does not contain the word *trust*, the *preamble* does, and that the distinction contended for between *use* and *trust* had no existence until a comparatively late period. See *Altham v. Anglesey*, Gilb. Eq. Rep. 17. To obviate the latter objection, it is maintained by Mr. Sanders that tenant in tail *is* within the statute of Hen. 8.; an opinion which, it is submitted, is directly opposed to the general stream of authority: *Co. Lit.* 19, b.; *Shep. Touch.* 509; *Gilb. on Uses*, 11, and Lord St. Leonards' note, *ibid.*

the judges by their construction of the statute created a novel kind of interest, since distinguished and now known by the name of *Trust*. Before the statute of Hen. 8. a person, to have had the complete ownership, must have united the *possession* of the land and the *use* of the profits. The possession and the use were even at common law recognised as distinct interests, though the *cestui que use* was left to Chancery for his remedy (a). On a feoffment to A. to the use of B. to the use of C., the possession was in A., the use in B., and the limitation over to C. was disregarded as surplusage. When the statute of Hen. 8. was passed, it executed the estate in B. by annexing the possession to the use; but having thus become *functus officio* it did not, as the Act was construed, affect the use over to C. However, Chancery, now that uses were converted into estates, decreed C. to have a title in equity, and enforced the execution of it under the name of a *trust* (b).

Land, use, and trust distinguished by Lord Hardwicke. — “Interests in land,” said Lord Hardwicke, “thus became of three kinds: first, the *estate in the land itself*, the ancient common-law fee; secondly, the *use*, which was originally a creature of equity, but since the statute of uses it drew the estate in the land to it, so that they were joined and made one legal estate; and thirdly, the *trust*, of which the common-law takes no notice, but which carries the beneficial interest and profits in a court of equity, and is still a creature of that court, as the use was before the statute” (c).

Trusts not within statutes relating to uses. — This newly created interest was held to be so perfectly distinct from the ancient use, that the statutory provisions by which many of the mischiefs of uses had been remedied, as the 19th Hen. 7. c. 15, by which uses had been made liable to writs of execution, and the 26th Hen. 8. c. 13, by * which [*8] they had become forfeitable to the Crown for treason, were decided to have no application. However, the *trust*

(a) Lit. s. 462, 463; Co. Lit. 272, b.; and see Carter, 197; Porey v. Juxon, Nels. 135; Megod's Case, Godb. 64.

(b) See Hopkins v. Hopkins, 1 Atk. 591.

(c) Willett v. Stanford, 1 Ves. 186; Coryton v. Helyar, 2 Cox, 342.

took the likeness of the *use*, conforming itself to the nature of special trusts and trusts of chattels, which had never been disturbed by any legislative enactment.

Trusts at first modeled after the pattern of uses. — To show how, the principles of uses prevailed after the statute of Hen. 8. it was held in the reign of Elizabeth (*a*), that the equitable term of a *feme covert* did not vest in the husband by survivorship, for a trust, it was said, was a thing in privity, and in the nature of an action, and there was no remedy for it but by writ of *subpoena*. And a few years after in the same reign it was resolved by all the Judges, that a trust was a matter of privity, and in the nature of a *chose in action*, and therefore was not *assignable* (*b*). And in the sixth year of King Charles the First it was decided by the Judges, that as a feme was dowable by act or rule of law, and a court of equity had no jurisdiction where there was not fraud or covin, the widow of a trustee was not bound by the trust, but was entitled beneficially to her dower out of the trust estate (*c*).

Improvements introduced by Lord Nottingham. — But during the reign of Charles the First and Charles the Second, and particularly during the Chancellorship of Lord Nottingham, who, from the sound and comprehensive principles upon which he administered trusts, has been styled the father of equity (*d*), the Courts gradually threw off the fetters of uses and, disregarding the operation of mere technical rules, proceeded to establish trusts upon the broad foundation of conformity to the course of common law. "In my opinion," said Lord Mansfield, "trusts were not on a true foundation till Lord Nottingham held the great seal; but by steadily pursuing from plain principles trusts in all their consequen-

ces, and by some assistance from the legislature, a
 [*9] noble, rational, and *uniform system of law has since
 been raised; so that trusts are now made to answer
 the exigencies of families and all purposes, without produc-

(*a*) Witham's Case, 4 Inst. 87;
 S. C. Popham, 106, *sub nomine* John-
 son's Case.

(*b*) Sir Moyle Finch's Case, 4 Inst.
 86.

(*c*) Nash v. Preston, Cro. Car. 190.

(*d*) Philips v. Brydges, 3 Ves. 127;
 Kemp v. Kemp, 5 Ves. 858.

ing one inconvenience, fraud, or private mischief, which the statute of Hen. 8. meant to avoid" (a).

Alterations made in trusts as regards the trustee. — As to the changes that were successively introduced, it was held *with reference to the trustee*, that *actual confidence in the person* was no longer to be looked upon as essential. A body *corporate* therefore was not exempted from the writ of *subpœna* on the ground of incapacity (b): and even the *king*, notwithstanding his high prerogative, was invested with the character of a Royal Trustee (c), though the precise mode of enforcing the trust against him was not exactly ascertained: to use the language of Lord Northington, "the arms of equity were very short against the Prerogative" (d). The subtle distinctions which had formerly attended the notion of *privity of estate* were also gradually discarded. Thus it was laid down by Lord Hale, that tenant in *dower* should be bound by a trust as claiming in the *per* by the assignment of the heir (e); and so it was afterwards determined by Lord Nottingham (f): and when an old case to the contrary was cited by Lord Jeffries, it was unanimously declared both by the bench and the bar to be against equity and the constant practice of the Court (g). A tenant by *statute merchant* was held to be bound upon the same principle, for he took, it was said, by the act of the party, and the remedy which the law gave thereupon (h). But as to the tenant by the *curtesy*, Lord Hale gave his opinion, that one in the *post* should not be liable to a trust *without express mention made by the party who created it*; and therefore tenant by * the [*10] *curtesy* should not be bound (a): but his Lordship's authority on this point was subsequently over-ruled, and

(a) *Burgess v. Wheate*, 1 Ed. 223.

(b) See *Green v. Rutherford*, 1 Ves. 468; *Attorney-General v. Whorwood*, 1 Ves. 536.

(c) See *Penn v. Lord Baltimore*, 1 Ves. 453; *Earl of Kildare v. Eustace*, 1 Vern. 439.

(d) *Burgess v. Wheate*, 1 Ed. 256.

(e) *Pawlett v. Attorney-General*, Hard. 469.

(f) *Noel v. Jevon*, Freem. 48.

(g) MS. note by an old hand in the copy of Croke's Reports in Lincoln's Inn Library, Cro. Car. 191.

(h) *Pawlett v. Attorney-General*, Hard. 467, *per* Lord Hale.

(a) *Pawlett v. Attorney-General*, Hard. 469.

curtesy as well as dower was made to follow the general principle.

As regards the *cestui que trust*. — With respect to the *cestui que trust*, or the person entitled to the *subpœna*, the narrow doctrine contained under the technical expression of privity began equally to be waived, or rather to be applied with considerable latitude of construction. "The equitable interest," said Justice Rolle, "is not a *thing in action*, but an *inheritance* or *chattel*, as the case may fall out" (*b*); and when once the trust, instead of passing as a *chose in action*, came to be treated on the footing of an actual *estate*, it soon drew to it all the rights and incidents that accompanied property at law: thus, the equity of the *cestui que trust*, though a bare contingency or possibility (*c*), was admitted to be *assignable* (*d*); and Witham's case, that a husband who survived his wife could not, for want of privity, claim her equitable chattel, was declared by the Court to be no longer an authority (*e*). So a *judgment creditor*, it was held by Lord Nottingham, might prosecute an equitable *feri facias* (*f*); and though Lord Keeper Bridgman refused to allow an equitable *elegit* (*g*), it is probable, had the question arisen before Lord Nottingham, his Lordship would in this, as in other cases, have acted on a more liberal principle: at all events, the creditor's right to relief in this respect has since been established by the current of modern authority (*h*). Again, a trust was decided by Lord Nottingham to be *assets* in the hands of the heir (*i*); and though Lord Guilford [*11] afterwards held the other way (*j*), yet Lord Nottingham's view of the subject appears to have been eventually established (*a*). *Curtesy* was also permitted of a trust estate, though the widow of a *cestui que trust* could

(*b*) King v. Holland, Styl. 21; see Casburne v. Casburne, 2 J. & W. 196.

(*c*) Warmstrey v. Tanfield, 1 Ch. Re. 29; Lord Cornbury v. Middleton, 1 Ch. Ca. 208; Goring v. Bickerstaff, 1 Ch. Ca. 8.

(*d*) Courthorpe v. Heyman, Cart. 25, per Lord Bridgman.

(*e*) King v. Holland, Al. 15.

(*f*) Anon. case, cited Balsh v. Wastall, 1 P. W. 445; Pit v. Hunt, 2 Ch. Ca. 73.

(*g*) Pratt v. Colt, Freem. 139.

(*h*) See *infra*.

(*i*) Grey v. Colville, 2 Ch. Re. 143.

(*j*) Creed v. Colville, 1 Vern. 172.

(*a*) See *infra*.

never make good her title to *dower* (b); "not," said Lord Mansfield, "on reason or principle, but because wrong determinations had misled in too many instances to be then set right" (c); or rather, as Lord Redesdale thought, because the admission of dower would have occasioned great inconvenience to purchasers — a mischief that in the case of curtesy was not to be equally apprehended (d).

Lord Mansfield's doctrines. — Principles governing trusts at the present day. — Lord Mansfield was for carrying the analogy of trusts to legal estates beyond the legitimate boundary. "A use or trust," he said, "was heretofore understood to be merely as an agreement, by which the trustee and all claiming from him in privity were personally liable to the *cestui que use*, and all claiming under him in like privity; nobody in the *post* was entitled under or bound by the agreement: but now the trust in this Court is the same as the *land*, and the trustee is considered merely as an instrument of conveyance" (e). And in the application of this principle his Lordship argued, that the estate of the *cestui que trust* was subject to *escheat*, and that on failure of heirs of the trustee, the lord who took by escheat was bound by the trust. But to these propositions the Courts of Equity have never yet assented (f). The limit to which the analogy of trusts to legal estates ought properly to be allowed was well enunciated by Lord Northington in the case of *Burgess v. Wheate*. "It is true," he said, "this Court has considered trusts *as between the trustee, cestui que trust, and those claiming under them*, as imitating the possession; but it would be a bold stride, and, in my opinion, a dangerous conclusion, to say therefore this Court has considered the creation and instrument of trust as a mere nullity, and the estate in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled * to it: for my own part [*12] *I know no instance where this Court has permitted the creation of a trust to affect the right of a third person*" (a);

(b) *Colt v. Colt*, 1 Ch. Re. 254.

(c) *Burgess v. Wheate*, 1 Ed. 224.

(d) See *infra*.

(e) *Burgess v. Wheate*, 1 Ed. 226.

[(f) But see now 47 & 48 V. c.

71, s. 4.]

(a) *Burgess v. Wheate*, 1 Ed. 250,

251.

that is, to illustrate the principle by instances, a tenant by the curtesy, or in dower, or by *elegit*, as claiming through the *cestui que trust* or trustee, though in the *post*, is bound by and may take advantage of the trust; but, according to the doctrine laid down by Lord Northington, the lord who comes in by escheat is not in any sense a privy to the trust, and therefore can neither reap a benefit from it on failure of heirs of the *cestui que trust*, nor is bound by the equity on failure of heirs of the trustee (*b*).

(*b*) It is clear that [prior to 47 & 48 V. c. 71], the lord [could] not acquire an equitable interest by escheat: *Burgess v. Wheate*, 1 Ed. 177; *Cox v. Parker*, 22 Beav. 168; but whether a lord taking the legal estate by escheat shall or not be bound by the trust, has never been decided.

See *post*, c. xii. s. 3. The Trustee Act, 1850, s. 15, enables the Court to make an order on failure of heirs of the trustee, but is the *Crown* bound by the Trustee Act? See note on second section of the Trustee Act, *post*. [See also 44 & 45 V. c. 41, s. 30.]

*PART I.

[*13]

DEFINITION, CLASSIFICATION, AND CREATION OF TRUSTS.

CHAPTER I.

DEFINITION OF A TRUST.

Definition of a trust. — As the doctrines of trusts are equally applicable to *real* and *personal* estate, and the principles that govern the one will be found *mutatis mutandis*, to govern the other, we cannot better describe the nature of a trust generally, than by adopting Lord Cook's definition of a *use*, the term by which, before the Statute of Uses, a trust (1) of lands was designated (*a*). A trust, in the words applied to the use, may be said to be "*A confidence reposed in some other,*

(*a*) *Burgess v. Wheate*, 1 Ed. 248, *Spillet*, 2 Atk. 160, *per Lord Hard- per Lord Keeper Henley*; *Lloyd v. wicke*.

(1) That a trust was anciently known as a *use*, appears from the *Merchant of Venice*. Thus, when Shylock had forfeited one half of his goods to the State to be commuted for a fine, and the other half of his goods to Antonio, the latter offered that, if the Court, as representing the State, would forego the forfeiture of the one half, he (Antonio) would be content himself to hold the other half in *use*, that is, in *trust* for Shylock for life, with remainder, after Shylock's death, for Jessica's husband: —

"So please my lord the duke, and all the court,
To quit the fine for one half of his goods;
I am content so he will let me have
The other half *in use*, — to render it,
Upon his death, unto the gentleman
That lately stole his daughter."

Merchant of Venice, Act IV, Scene I.

This interpretation clears Antonio's character from the charge of selfishness to which it would be exposed if he were to keep the half for his own use during his life.

See Heard's "Shakespeare as a Lawyer," pp. 98, 94; 2 Wash. Real Prop. chap. II.; *Wallace v. Wainwright*, 87 Pa. St. 263; *Croxall v. Shererd*, 5 Wall. 268; *Reid v. Gordon*, 85 Md. 183; *Underhill on Trusts and Trustees*, 1; 1 Story Eq. Jur. §§ 56, 58; *Commissioners v. Walker*, 6 How. 143; 38 Am. Dec. 433; *Chaffee v. Risk*, 12 Harris, 432.

not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which cestui que trust has no remedy but by subpœna in Chancery" (b).

1. **A confidence.** — It is "a confidence"; not necessarily a confidence *expressly* *reposed by one party in another, for it may be raised by implication of law: and the trustee of the estate need not be *actually* capable of confidence for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate; but a trust is a confidence, as distinguished from *jus in re* and *jus ad rem*, for it is neither a *legal* property nor a *legal* right to property (a).

2. **Reposed in some other.** — It is a confidence "*reposed in some other*"; not in some other than the author of the trust, for a person may convert himself into a trustee, but in some other than the *cestui que trust*; for as a man cannot sue a *subpœna* against himself, he cannot be said to hold upon trust for himself (b). If the legal and equitable interests happen to meet in the same person, the equitable is for ever absorbed in the legal. — Thus, if A. be seised of the legal inheritance *ex parte paternâ*, and of the equitables *ex parte maternâ*, upon the death of A. the heir of the maternal line has no equity against the heir of the paternal (c). And the same rule prevails as to leaseldors for lives (d): as if the legal estate in a freehold lease be vested in a husband and his heirs, in trust for the wife and her heirs, the child who is the heir of both, and takes the legal estate *ex parte paternâ* and the equitable

(b) Co. Lit. 272, b. Law and equity are now administered in all the courts alike.

(a) Bacon on Uses, 5. See *Wainwright v. Elwell*, 1 Mad. 634.

(b) *Goodright v. Wells*, Dougl. 747, per Lord Mansfield; *Conolly v. Conolly*, 1 Ir. Rep. Eq. 383, per Christian, L. J.

(c) *Selby v. Alston*, 3 Ves. 339; *Goodright v. Wells*, Dougl. 747, per Lord Mansfield; *Wade v. Paget*, 1 B. C. C. 363; S. C. 1 Cox, 76;

Philips v. Brydges, 3 Ves. 126, per Lord Alvanley; *Finch's case*, 4 Inst. 85, 3d resolution; *Harmood v. Oglander*, 8 Ves. 127, per Lord Eldon; *Conolly v. Conolly*, 1 Ir. Rep. Eq. 376. These cases, except the last, were all before the Inheritance Act, 3 & 4 W. 4. c. 106; but which will probably be held not to vary the law. So now decided *Re Douglas*, 28 Ch. D. 827.

(d) *Creagh v. Blood*, 3 Jones & Lat. 133.

estate *ex parte maternâ* will, by the merger¹ of the equitable in the legal, become seised both at law and at equity, *ex parte paternâ*, and the subsequent devolution will be regulated accordingly.

How far the equitable merges in the legal estate. — But this rule holds only where the legal and equitable estates are co-extensive and commensurate; for if a person be seised of the legal estate in *fee*, and have only a *partial equitable* interest, to merge the one in the other might occasion an injurious disturbance of rights. Thus before the Fines and Recoveries Act (*e*), if lands had been conveyed unto and to the use of A. and his heirs, in trust for B. in tail with remainder in trust for A. in fee, had the equitable remainder limited to A. been converted into a legal estate, it would not have been barrable by B.'s equitable recovery (*f*).

*** In what sense mortgagee in fee is trustee for himself** [*15] **and his executors.** — In the case of a mortgagee in fee it [has been] said [that] a man and his *heirs* are trustees for himself and his *executors* (*a*). But the meaning was, that, until a release or foreclosure of the equity of redemption, the interest of the mortgagee was of the nature of personality, and passed on his death to his personal representative; the *heir*, therefore, took the estate upon trust for the *executor* (*b*). A release or foreclosure, unless it happen in the lifetime of the mortgagee, comes too late after his decease to alter the character of the property, for, *as the tree falls, so it must lie* (*c*) (1).

(*e*) 3 & 4 W. 4. c. 74.

(*f*) Phillips v. Brydges, 3 Ves. 120: see the judgment, pp. 125-127; Robinson v. Cumming, Rep. t. Talb. 164; S. C. 1 Atk. 473; and see Boteler v. Allington, 1 B. C. C. 72; Merest v. James, 6 Mad. 118; Habbergham v. Vincent, 2 Ves. jun. 204; Buchanan v. Harrison, 1 Johns. & Hem. 662.

(*a*) Kendal v. Mickfield, Barn. 50, per Lord Hardwicke.

[(*b*) Now, by the Conveyancing and Law of Property Act, 1881, s. 30, the estate of the mortgagee devolves upon the legal personal representative to the exclusion of the heir or devisee.]

• (*c*) Canning v. Hicks, 2 Ch. Ca.

(1) But if the heir foreclosed or obtained a release of the equity of redemption, it was said he might keep the estate, and pay the executor the debt only. Clarkson v. Bowyer, 2 Vern. 67, per Cur. *Sed quere*.

¹ Bolles v. State Trust Co. 27 N. J. Eq. 308; Badgett v. Keating, 31 Ark. 400; Truebody v. Jacobson, 2 Cal. 82; Lockwood v. Sturtevant, 6 Conn. 373;

Trust not issuing out of the land, but collateral to it. — A trust is “*not issuing out of the land, but as a thing collateral to it.*” A legal charge, as a rent, issues directly out of the land itself, and therefore binds every person, whether in the *per* or *post*, whether a purchaser for valuable consideration or volunteer, whether with notice or without; but a trust is not part of the land, but an incident made to accompany it, and that not inseparably, but during the continuance only of certain indispensable adjuncts; for —

4. Annexed in privity to the estate. — A trust is “*annexed in privity to the estate,*” that is, must stand or fall with the person by whom the trust is created; as, if the trustee be disseised, the tortious fee is adverse to that impressed with the trust, and therefore the equitable owner, until the fusion of law and equity, could not have himself sued the disseisor, but must have brought an action against him at law in the name of the trustee (*d*).

Extent of the term privity to the estate. — During the system of *uses*, and also while *trusts* were in their infancy, the notion of privity of estate was not extended to tenant by the curtesy, or in dower, or by *elegit*, or in fact to any person claiming by operation of law, though through the trustee; but in this respect the landmarks have been carried forward,

and at the present day a trust follows the estate into [*16] the hands of every one **claiming under the trustee*, whether in the *per* or *post*. It was the opinion of Sir T. Clarke and Lord Northington, that a lord taking by escheat, as claiming by title paramount, and not either in the *per* or *post*, was not affected by any privity, and therefore could not be compelled to execute the trust (*a*). But this question was never actually decided, and has in great measure become immaterial (*b*).

187; S. C. 1 Vern. 412; Tabor v. resolution; and see Gilbert on Uses, Grover, 2 Vern. 367; S. C. 1 Eq. Ca. edited by Lord St. Leonards, p. 429, Ab. 328; Clerkson v. Bowyer, 2 Vern. note 6. See now 36 & 37 Vic. c. 66, s. 24.

66; Gobe v. Earl of Carlisle, cited *ib.*; (a) Burgess v. Wheate, 1 Eden, Wood v. Nosworthy, cited Awdley v. 203, 246.

Awdley, 2 Vern. 193. (b) See *post*, c. xii. s. 3.

(d) Finch's case, 4 Inst. 85, 1st Earle v. Washburn, 7 Allen, 95; Lewis v. Starke, 18 Miss. 120; Sheldon v. Edwards, 35 N. Y. 279.

5. **Trust annexed in privity to the person.**—A trust is “*annexed in privity to the person.*” To entitle the *cestui que trust* to relief in equity it is not only necessary that he should prove the creation of the trust and the continuance of the estate supporting it, but should also establish that the assign is not personally privy to the equity, and therefore amenable to the *subpœna*. If it can be shown that the assign had *actual* notice, then, whether he paid a valuable consideration or not, he is plainly privy to the trust, and bound to give it effect; but if actual notice cannot be proved, then, if he be a volunteer, the court will still affect him with notice by presumption of law; but if he be a purchaser for value, the court must believe, until proved to the contrary, that, having paid for the estate, he was ignorant, at the time he purchased, of another’s equitable title. A purchaser for valuable consideration without notice therefore is the only assign against whom privity annexed to the person cannot at the present day be charged (c).

6. **No remedy of the *cestui que trust* but in Chancery.**—The *cestui que trust* “*has no remedy but by a subpœna in Chancery.*”¹ And by chancery must be understood, not exclusively the court of the Lord Chancellor, but any court invested with an equitable jurisdiction, as opposed to com-

(c) See 37 & 38 Vic. c. 78, s. 7, repealed by 38 & 39 Vic. c. 87, s. 129.

¹ The remedy must be in equity; *Dorsey v. Garey*, 30 Md. 489; *McCartney v. Bostwick*, 32 N. Y. 53; and the action is to be brought in the name of the trustee; *Baptist Society v. Hazen*, 100 Mass. 322; *Fitzpatrick v. Fitzgerald*, 13 Gray, 400; *Cox v. Walker*, 26 Me. 504; *Beach v. Beach*, 14 Vt. 28; *Davis v. Charles River Br. R. R. Co.* 11 Cush. 506; *Moore v. Burnet*, 11 Ohio, 334; *Doggett v. Hart*, 5 Fla. 215; but *Stearns v. Palmer*, 10 Met. 35. The trustee or his grantee may protect his legal title against a suit at law by the *cestui que trust*; *Taylor v. King*, 6 Munf. 358; *Nicoll v. Walworth*, 4 Denio, 385; *Reece v. Allen*, 5 Gilm. 241; *Canoy v. Troutman*, 7 Ired. 155. A bill in equity may be maintained to establish a trust, where the jurisdiction over an alleged trustee is likely to terminate; *Price v. Minot*, 107 Mass. 62; *Baylies v. Payson*, 5 Allen, 473. In Pennsylvania the *cestui que trust* may maintain ejectment, even against the trustees; *School v. Dunkleberger*, 6 Barr, 29; *Congregation v. Johnston*, 1 Watts & S. 56. A suit may be brought by a trustee, which he would be estopped to bring in his individual capacity; *Worthy v. Johnson*, 10 Ga. 358; 64 Am. Dec. 393.

mon-law courts (*d*), and spiritual courts (*e*), neither of which until the fusion of law and equity had any cognizance [*17] in matters of trust. A common-law *court could never, from the defective nature of its proceedings, have specifically enforced a trust; but at one time it affected to punish a trustee in damages for breach of the implied contract (*a*): an exercise of authority, however, clearly extra-provincial, and afterwards abandoned (*b*). Had a Spiritual court attempted to meddle with a trust, the Court of Queen's Bench might have been moved to issue a prohibition (*c*).

36 & 37 V. c. 66. — By 36 & 37 Vict., c. 66, and 37 & 38 Vict., c. 83, it was enacted that as from 1st November, 1875 (inclusive), there should be "One Supreme Court of Judicature" consisting of "Her Majesty's High Court of Justice" and "Her Majesty's Court of Appeal," and the High Court of Justice was made to comprise five divisions, viz.: the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division [but by Order in Council dated 16th December, 1880, under section 32 of the first-

(*d*) *Sturt v. Mellish*, 2 Atk. 612, *per* Lord Hardwicke; *Allen v. Imlett*, F. L. Holt's Rep. 641; *Holland's case*, Styl. 41, *per* Rolle, J.; *Queen v. Trustees of Orton Vicarage*, 14 Q. B. 139; *Vanderstegen v. Witham*, 6 M. & W. 457; *Bond v. Nurse*, 10 Q. B. 244; *Edwards v. Lowndes*, 1 Ell. & Bl. 81; *Drake v. Pywall*, 4 Hurlst. & Colt. 78. In *The Queen v. Abrahams*, 4 Q. B. 157, the Court professed to proceed upon the *legal* right so that the principle was not disturbed, though there may be a question how far the facts justified the assumption upon which the Court acted. In *Roper v. Holland*, 3 Ad. & Ell. 99, a *cestui que trust* recovered upon an action of debt for money had and received on proof of the admission by the trustee that he had a balance in hand for the plaintiff; and see *Sloper v. Cottrell*, 2 Jur. N. S. 1046; *Topham v. Morecraft*, 4 Jur. N. S. 611.

(*e*) *Miller's case*, 1 Freem. 283; *King v. Jenkins*, 3 Dowl. & Ry. 41; *Farrington v. Knightly*, 1 P. W. 549, *per* Lord Parker; *Edwards v. Graves*, Hob. 265; *Witter v. Witter*, 3 P. W. 102, *per* Lord King.

(*a*) *Megod's case*, Godb. 64; *Jevon v. Bush*, 1 Vern. 344, *per* Lord Jeffries; *Smith v. Jameson*, 5 T. R. 603, *per* Buller, J.; and see 1 Eq. Ca. Ab. 384, D. (*a*).

(*b*) *Barnadiston v. Soame*, 7 State Trials, 443, Harg. ed. *per* Chief Justice North; *Sturt v. Mellish*, 2 Atk. 612, *per* Lord Hardwicke; *Holland's case*, Styl. 41, *per* Rolle, J.; *Allen v. Imlett*, F. L. Holt's Rep. 14.

(*c*) *Petit v. Smith*, 1 P. W. 7; *Edwards v. Freeman*, 2 P. W. 441, *per* Sir J. Jekyll; *Barker v. May*, 4 M. & R. 386; *Ex parte Jenkins*, 1 B. & C. 655.

mentioned act, the Common Pleas Division and the Exchequer Division have been abolished].

Equitable estates and rights are now to be noticed and acted upon in all the courts, and where there is any conflict between the rules of equity and the rules of common law, the rules of equity are to prevail. See sections 24 & 25 of the first-mentioned Act.

Subject to any rules to be made in pursuance of the new enactments, all causes and matters pending in the Court of Chancery at the commencement of the Act of 36 & 37 Vict. are transferred to the *Chancery division of the High Court of Justice*, and, subject as aforesaid, all causes and matters for the execution of *trusts*, charitable or private, are to be assigned to the same division, and for that purpose every document by which the cause or matter is commenced is to be marked for that division, or with the name of the Judge to whom the cause or matter is to be assigned. See sections 33 & 34.

CLASSIFICATION OF TRUSTS.

1. **Trusts simple or special.** — The first and natural division of trusts is into *simple* and *special*.

Simple trust. — The *simple* trust is where property is vested in one person *upon trust* for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of law. In this case the *cestui que trust* has *jus habendi*, or the right to be put into actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs.

Special trust. — The *special* trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention; as where a conveyance is to trustees upon trust to sell for payment of debts.

2. **Special trusts either instrumental or discretionary.** — Special trusts have again been subdivided into *ministerial* (or *instrumental*) and *discretionary*. The former, such as demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; the latter, such as cannot be duly administered without the application of a certain degree of prudence and judgment.

A trust to convey an estate must be regarded as ministerial; for, provided the estate be vested in the *cestui que trust*, it is perfectly immaterial to him by what manner of person the conveyance is executed.

Trust to sell held by Mr. Fearne to be instrumental. — A trust for sale was considered by Mr. Fearne as also ministerial; "for the price," he said, "is not arbitrary, or at the trustee's discretion, but to the best that can be gotten for the

estate, which is a fact to be ascertained independently of any discretion in the trustee" (a). But there is much room for judgment in the time *and mode of proceeding to a sale, and the precautions that are taken will have a material influence upon the price; and Mr. Fearne's opinion cannot at the present day be maintained (a).

Examples of discretionary trusts.—A fund vested in trustees upon trust to distribute among such charitable objects as the trustees shall think fit (b), or an advowson conveyed to them upon trust to elect and present a proper preacher (c), is clearly a discretionary trust; for the selection of the most deserving objects in the first instance, and the choice of the best candidate in the second, is a matter calling for serious deliberation, and not to be determined upon without due regard to the merits of the candidates, and all the particular circumstances of the case.

3. Mixture of trust and power.—There is frequent mention made in the books of *a mixture of trust and power* (d), by which is meant a trust of which the outline only is sketched by the settlor, while the details are to be filled up by the good sense of the trustees. The *exercise* of such a power is *imperative*, while the *mode* of its execution is matter of judgment and *discretionary*.

Distinguished from trust with power annexed.—A *mixture of trust and power* is not to be confounded with a *common trust to which a power is annexed*; for, in the former case, as in a trust "to distribute at the discretion of the trustees," they are bound at all events to distribute, and the manner only is left open;¹ but in the latter case, the trust itself is complete, and the power, being but an accessory, may be exercised or not, as the trustee may deem it expedient; as

(a) Fearne's P. W. 313.

(a) See King v. Bellord, 1 H. & M. 343; Robson v. Flight, 5 N. R. 344; S. C. 4 De G. J. & S. 608; Clarke v. Royal Panopticon, 4 Drew. 29.

(b) Attorney-General v. Gleg, 1 Atk. 366; Hibbard v. Lambe, Amb.

309; Cole v. Wade, 16 Ves. 27; Gower v. Mainwaring, 2 Ves. 87.

(c) Attorney-General v. Scott, 1 Ves. 413; Potter v. Chapman, Amb. 98.

(d) Cole v. Wade, 16 Ves. 43; Gower v. Mainwaring, 2 Ves. 89.

¹ Steere v. Steere, 5 Johns. Ch. 1; 9 Am. Dec. 256.

where lands are limited to trustees with an authority to grant leases, or stock is transferred to trustees with a power of varying the securities; for in such cases the power forms no integral part of the trust, but is merely collateral and subsidiary, and the execution of it, in the absence of fraud, cannot be compelled by application to the Court.

4. **Trusts lawful and unlawful.**—Again, trusts may be divided, with reference to the object in view, into *lawful* and *unlawful*.¹ The former, such as are directed to some honest purpose (as a trust to pay debts, &c.), which are called by Lord Bacon *Intents* or *Confidences*, and will be administered by the Court. The latter are trusts created for the attainment of some end contravening the policy of the law, and therefore not to be sanctioned in a forum [*20] professing not only justice but *equity, as a trust to defraud creditors or to defeat a statute. Such are designated by Lord Bacon as *Frauds*, *Covins*, or *Collusions* (a).

5. **Trusts public and private.**—Another division of trusts is into *public* and *private*. By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for *charitable* purposes, and indeed *public* trusts and *charitable* trusts may be considered in general as synonymous expressions (b). In *private* trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some legal disability, it is, or within

(a) Bac. on Uses, 9.

(b) See Attorney-General v. Aspinall, 2 M. & Cr. 622; Attorney-General v. Heelis, 2 S. & S. 76; Attorney-General v. Corporation of Shrewsbury, 6 Beav. 220; Walker v. Richardson, 2 M. & W. 802; Attorney-General v. Webster, 20 L. R. Eq. 483. But see Attorney-General v. Forster, 10 Ves. 344; Attorney-General v. Newcombe, 14 Ves. 1; Fearon v. Webb, ib. 19; Dolan v. Macdermot, 5 L. R. Eq. 60

(in which M. R. observed "*Public purposes* are such as mending or repairing roads, supplying water, making or repairing bridges, and are distinguished from *charities* in the shape of almsgiving, building almshouses, founding hospitals, and the like;") but *public* purposes, he added, "*are all in a legal sense charities*"; affirmed on appeal, 3 L. R. Ch. App. 677.

¹ Lewis v. Nelson, 1 McCarter, 94.

the allowed limit will be, competent to control, modify, or determine the trust. The duration of trusts of this kind cannot be extended by the will of the settlor beyond the bounds of legal limitations, viz., a life or lives in being with an engraftment of twenty-one years. A *public* or *charitable* trust, on the other hand, has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character, and is not confined within the limits prescribed to a settlement upon a private trust (*c*).

(*c*) *Christ's Hospital v. Grainger*, 1 Mac. & Gord. 460; *Stewart v. Green*, 5 I. R. Eq. 470.

OF THE PARTIES TO THE CREATION OF A TRUST.

Now that we have defined and distributed trusts, we shall next enter upon the creation of them: *First*, By the act of a party, and *Secondly*, By operation of Law. Upon the subject of the former class we propose to treat, *First*, Of the necessary parties to the creation of a trust; *Secondly*, What property may be made the subject of a trust; *Thirdly*, With what formalities a trust may be created; *Fourthly*, Of Transmutation of Possession; *Fifthly*, What may be the object or scope of the trust; and *Sixthly*, In what language a trust may be declared.

In this chapter, we shall consider the necessary parties to a trust, under the three heads of the *Settlor*,¹ the *Trustee*, and the *Cestui que trust*.

SECTION I.

OF THE SETTLOR.

1. **General power creating a trust.** — As the creation of a trust is a modification of property in a particular form, it may be laid down as a general rule that whoever is competent to deal with the legal estate, may, if he be so disposed, vest it in a trustee for the purpose of executing the settlor's intention.

2. **The Crown.** — The *sovereign*,² as to his private property, may, by letters patent, grant it to one person upon trust for another (*a*). But the trust must appear upon the face of the letters patent; for if the grant be expressed to be

(a) Bac. on Uses, 66.

¹ The settlor's intent must be carried into effect unless it contravenes some policy of the law. *Wright v. Miller*, 8 N. Y. 9; 59 Am. Dec. 438.

² In the United States, a state may be a settlor. *Commissioners v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433.

made to one person, a trust cannot be proved by *parol* in favour of another, for this would contradict the nature of the instrument which purports to be an act of bounty to *the grantee (a). However, if the grant be to A. [*22] and his *heirs* with the limitation of a beneficial interest to A. for life only, a trust of the remainder will not pass to the grantee, but will result to the Crown, for the presumption of bounty as to the whole is rebutted by the declared intention as to the part (b).

Prizes. — All prizes taken in war vest in the sovereign, and are commonly by the royal warrant granted to trustees upon trust to distribute in a prescribed mode amongst the captors; but an instrument of this kind is held not to vest an interest in the *cestuis que trust* which they can enforce in equity, but it may at any time be revoked or varied at the pleasure of the sovereign before the general distribution (c). [The effect of such an instrument is merely to appoint the persons named to be the agents of the sovereign to effect the distribution (d).]

Will of the sovereign. — The Crown may also by *will* bequeath its private personal property to one person in trust for another, but the will must be in writing and under the sign manual (e), though the Probate Court has no jurisdiction to admit it to probate (f).

3. Corporations. — As to the power of *Corporate Bodies*¹ to create a trust, it was competent to municipal corporations, before the Municipal Corporations Act (g), to alienate their

(a) *Fordyce v. Willis*, 3 B. C. C. 577.

(b) *Bac. on Uses*, 66.

(c) *Alexander v. Duke of Wellington*, 2 R. & M. 35. As to the execution of the trust by the agency of persons deputed by the principals, see *Tarragona*, 2 Dods. Adm. Rep. 487.

[(d) *Kinlock v. Secretary of State for India in Council*, 15 Ch. D. 1; 7 App. Cas. 619.]

(e) 39 & 40 G. 3. c. 88, s. 10.

(f) *Williams on Executors*, 14, 8th ed. In the goods of his late Majesty Geo. 3. 3 Sw. & Tr. 199.

(g) 5 & 6 W. 4. c. 76.

¹ May, subject to their charters, and the laws under which they are organized, alienate their property: *Angell on Corp.* § 191; *Barings v. Dabney*, 19 Wall. 1; *Dana v. Bank*, 5 Watts & S. 224; *Catlin v. Eagle Bank*, 6 Conn. 233; *Hopkins v. Turnpike Co.* 4 Humph. 403; *Maryland v. Bank*, 6 Gill & J. 206; *Barry v. Merchant's Co.* 1 Sandf. Ch. 280.

property, and as a consequence to vest it in a trustee (*h*). But now municipal corporations are themselves trustees of their property, for the public purposes prescribed by the Municipal Corporations Act, and are debarred from alienating their real (*i*) or personal estate (*j*) without the consent of the Lords of the Treasury. A corporation, however, not included in the schedules to the Act still retains its power of alienation (*k*).

4. *Feme covert*. — A *Feme Covert* may create a trust of real estate, but, unless it be property settled to her separate use, it must be done with the consent of her husband, and there must be all the attendant formalities required by the

Fines and Recoveries Act, 3 & 4 W. 4, c. 74 [as modified by the Conveyancing Act, 1882, 45 & 46 * Vict.

c. 39, s. 7. But under the Married Women's Property Act, 1882 (*a*), a woman married since the 31st Dec. 1882, and also a woman married before that date as to property acquired by her after that date, can create a trust of real estate without the concurrence of her husband and without the formalities of the Fines and Recoveries Act.¹]

5. 20 & 21 Vict. c. 57. — As to her *choses en action*, by a recent statute (*b*) (commonly called Malins's Act), a feme covert is enabled with the concurrence of her husband, and on being separately examined in the manner prescribed by the Fines and Recoveries Act, to dispose by deed of any *future* or *reversionary interest* created by an *instrument made after the 31st December, 1857*, and as to which interest her power of anticipation is not specially restricted; and is also authorized to release or extinguish her right or equity to a settlement out of personal estate to which she is entitled *in possession* under such *instrument* as aforesaid. But any per-

(*h*) Colchester v. Lowten, 1 V. & B. 226.

(*i*) 5 & 6 W. 4. c. 76, s. 94.

(*j*) Attorney-General v. Aspinwall, 2 M. & Cr. 613; Attorney-General v. Wilton, Cr. & Ph. 1.

(*k*) Evan v. The Corporation of Avon, 29 Beav. 144.

[(*a*) 45 & 46 Vict. c. 75, ss. 2, 5.]

(*b*) 20 & 21 Vict. c. 57.

¹ Married women in America may convey their property to trustees. Young v. Graff, 28 Ill. 20; Durant v. Ritchie, 4 Mason, 45; 1 Redf. on Wills, 21-28; Perry on Trusts, § 32.

sonal estate settled for her benefit upon the occasion of her *marriage* is excepted from the foregoing powers (c); and an appointment after the date of the Act, but in execution of a power created by a settlement of a previous date, is not within the Act (d). And as the interest must be created by an *instrument*, a share of a feme covert as next of kin under an intestacy is not within the Act.

[By an assignment under this statute the wife can transfer her future property discharged from her husband's right as fully and effectually as if she were a feme sole, and the assignment does not operate as that of the husband and wife according to their respective interests (e). The concurrence of the husband will therefore be good, although there may be a right of retainer as against him (f), or although he may have previously executed a creditor's deed or been adjudicated a bankrupt (g).]

Whether the act applies to choses en action in possession. — It will be observed that the statutory power of disposition given by Malins's Act to a feme covert extends in terms no further than to her *future* or *reversionary* interests not limited to her by her marriage settlement; and as to *choses en action in possession*, the feme covert, though enabled to waive her equity to a settlement, has no express power of absolute disposition given her. If *therefore a feme [*24] covert be entitled to a *chose en action* in possession, and join with her husband in assigning it to a trustee, then if it be not reduced into possession during the coverture, and the wife survives, the question arises whether, though the formalities prescribed in the Act were complied with, she may not claim the fund by survivorship. The meaning of the framer of the Act probably was, that, as to *choses en action* to which a feme covert is entitled *in possession*, the husband can compel a transfer of them to himself, subject only to the wife's equity to a settlement, and as the Act

(c) See a case with reference to this section, *Clarke v. Green*, 2 H. & M. 474.

(d) *Re Butler's Trusts*, 3 Ir. Rep. Eq. 188.

[(e) *Re Batchelor*, 16 L. R. Eq. 481.]

[(f) *Re Batchelor, ubi sup.*]

[(g) *Re Jakeman's Trusts*, 23 Ch. D. 344; *Cooper v. Macdonald*, 7 Ch. D. 288.]

enables a feme covert to waive her equity to a settlement, the husband and wife together can deal with such *choses en action* by making it imperative on the trustees to transfer the fund to the husband or his nominee.

6. *Choses en action*, &c. *irrespectively of the Act*.—The husband alone may create a trust of the wife's *choses en action sub modo*; that is, if they be reduced into possession during the coverture, the settlement will be unimpeachable, but if they remain *choses en action* at the death of the husband, the wife will be entitled to them by survivorship.

Chattels real.—As to the wife's equitable chattels real, the husband may, subject to the wife's equity to a settlement (a), create a trust of them *jure mariti* (b), unless the chattel be of such a nature that it cannot possibly fall into possession during the coverture (c).

[7. *Recent alterations*.—The above observations apply only to property which was acquired before the 1st of January, 1883, by women married before that date; as in all other cases the property vests in the wife, independently of her husband, and she has power to dispose or create a trust of it without his concurrence (d).]

8. *Separate use*.—As regards property settled to the *separate use* of a feme covert, she is to all intents and purposes considered a *feme sole*,¹ as, if real estate be conveyed to a trustee and his heirs, or if personal estate be assigned to a trustee and his executors upon trust for the feme covert for her sole and separate use, and to be at her sole disposal as to the fee-simple in the one case and the absolute interest in the other, she has the entire control, and may exercise her ownership or implied power of appointment by creating a trust, extending even beyond the coverture. So if the feme covert be tenant for life to her separate use, she has full power to make a settlement of her whole life estate, and not

(a) *Hanson v. Keating*, 4 Hare, 1.

(c) *Duberly v. Day*, 16 Beav. 33.

(b) *Donne v. Hart*, 2 R. & My. 360.

[(d) 45 & 46 Vic. c. 75.]

¹ Hill on Trustees, 421; 2 Perry on Trusts, Chap. XXII. on Trustees for Married Women, gives an abstract of laws in the various states relating to them. May dispose of property by will; *Mory v. Michael*, 18 Md. 227; may dispose of allowance, or savings from trust income; *Story, Eq. Jur. § 1375*; *Picquet v. Swan*, 4 Mason, 455. But see *Story, Eq. Jur. § 1375 a*.

during the coverture only. But in all cases where the power of anticipation is restrained, the feme covert can make no disposition of the property, except as to the *annual produce which has actually become due (a). [*25] If a settlement be *fraudulently* procured from the wife by a husband by virtue of her separate use, it may be set aside (b).

9. 33 & 34 Vict. c. 93. — The Married Women's Property Act, 1870 (c), enacted by sect. 1, that *wages and earnings* made by a married woman separately from her husband after the date of the Act (9th of Aug. 1870), were to be deemed settled to her separate use; and, by sect. 7, that where a woman married after the date of the Act was entitled to any personal property as *next of kin*, or to any sum not exceeding 200*l.*, under any *deed or will*, it should belong to her for her separate use; and, by the next section, that "rents and profits" of any real estate descending upon such married woman as *heiress*, should also belong to her for her separate use.

[45 & 46 Vict. c. 75. — This Act has been repealed and its place supplied by the Married Women's Property Act, 1882 (d), which makes all property acquired after the commencement of the Act (1st of January, 1883), by women married before that date, and also all the property of women married after that date, their separate property.]

10. *Infants*. — If an *Infant* before the Fines and Recoveries Act had levied a fine or suffered a recovery, he might also have declared the uses (e), and unless the fine or recovery had been reversed by him during his nonage he had been bound by the declaration (f), but deeds have now been substituted for fines and recoveries, and every deed of an infant, whether under the Act or independent of it, either is void or may be avoided.

[(a) See now 44 & 45 Vic. c. 41. s. 39, under which a married woman with the consent of the Court may bind her interest notwithstanding a restraint on alienation.]

(b) *Knight v. Knight*, 11 Jur. N. S. 617.

(c) 33 & 34 Vic. c. 93.

[(d) 45 & 46 Vic. c. 75; see as to these acts *post*, Chap. XXVIII. sect. 6.]

(e) *Gilb. on Uses*, 41, 245, 250.

(f) *Gilb. on Uses*, 248.

Feoffment. — An infant until recently might have made a *Feoffment*, and at the same time have declared a use upon it, and both feoffment and use were voidable only and not void (*g*); and by analogy the infant might also have engrafted a trust upon the legal estate; but a Court of equity would never have allowed any equitable interest to be enforced against the infant himself to his prejudice, but gave him the same power of avoidance over the equitable as he had over the legal estate, and if the infant had died without having avoided the trust, the Court would still have investigated the transaction, and seen that no unfair advantage was taken (*h*).

Custom of Kent. — An infant¹ may by the custom of [*26] Kent for valuable *consideration certainly, and, according to the better opinion, even without value (*a*), make a feoffment at the age of fifteen, and upon such feoffment he may declare uses (*b*). But a Court of equity would no doubt confine such a custom within its narrowest bounds, and as trusts have sprung into being since the statute of Hen. 8, might hold the custom to be void as of recent growth in respect of the equitable interest, and at all events would not allow the custom to be made an instrument of fraud.

Wills Act. — Before the late Wills Act (*c*) an infant of the age of fourteen years might have bequeathed his personal estate, and therefore might have created a trust of it by will; but now, as regards personal as well as real estate, every testator must be of the age of twenty-one years.

(*g*) Bac. on Uses, 67; Bac. Ab. Uses, E. See now 8 & 9 Vic. c. 106, s. 3.

(*a*) Robinson on Gavelkind.

(*b*) Gilb. on Uses, 250.

(*c*) 7 W. 4 & 1 Vic. c. 26.

(*h*) See Cr. Dig. vol. iv. p. 130.

¹ May create a trust which is voidable; *Bool v. Mix*, 17 Wend. 119; *Tucker v. Moreland*, 10 Pet. 71; *Zouch v. Parsons*, 3 Burr. 1794; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *McCall v. Parker*, 13 Met. 372; *Irvine v. Irvine*, 9 Wall. 617; but by infant only, when of age; *Ingraham v. Baldwin*, 12 Barb. 9; except in case of his death; *Starr v. Wright*, 20 Ohio St. 97. As to marriage settlements, see *Levering v. Levering*, 3 Md. Ch. 365; *Lee v. Stuart*, 2 Leigh. 76; *Wilson v. McCullough*, 19 Pa. St. 77; *Temple v. Hawley*, 1 Sandf. Ch. 163; *Healy v. Rowan*, 5 Gratt. 414; *Whichcote v. Lyle*, 28 Pa. St. 73; *Succession of Wilder*, 22 La. Ann. 219; *M'Cartee v. Teller*, 2 Paige, 511.

11. **Lunatics.**—*Lunatics or Idiots*¹ might, before the Fines and Recoveries Act, have levied a *fine* or suffered a *recovery*, and the uses declared would have been valid until the fine or recovery was reversed. The *deed* of a lunatic or idiot may be void or not according to circumstances (*d*). The *feoffment* of a lunatic or idiot, while the feoffment operated tortiously, was voidable by the heir only (*e*). However, should a lunatic or idiot have engrafted a declaration of trust upon any legal estate passed by him, a Court of equity would have had jurisdiction to set it aside (*f*); though generally it declined to interfere even in this case as against a purchaser for valuable consideration without notice of the lunacy or idiocy (*g*).

12. **Bankruptcy.**—If a man be declared a *bankrupt*,² all the real and personal estate to which he is or may become entitled at the commencement of his bankruptcy, [or before his discharge,] vests in his trustee (*h*); but the surplus after payment of his debts still belongs to him (*i*), and of this interest he may create a trust.

13. **Alien as to real estate.**—An *Alien* might always have acquired real estate, whether freeholds or chattels real, by *purchase*, though he could not take it by operation of law, as by descent or *jure mariti*; and if he purchased it he might have held it until office found, but could not give an alienee a better title than he had himself (*j*). An alien,
* therefore, could only create a trust of real estate [*27]
until the Crown stepped in.

(*d*) See *Molton v. Camroux*, 2 Exch. 487; 4 Exch. 17; *Elliott v. Ince*, 7 De G. M. & G. 488; *Campbell v. Hooper*, 3 Sm. & Giff. 153. & *Gord.* 486; *Greenslade v. Dare*, 20 Beav. 285.

(*e*) Co. Lit. 247, b.

(*f*) See *Cruise*, vol. iv. p. 130, vol.

v. p. 253; *Neil v. Morley*, 9 Ves. 478.

(*g*) See *Price v. Berrington*, 3 Mac.

[(*h*) 46 and 47 Vic. c. 52, ss. 44, 54.]

[(*i*) Sect. 65.]

(*j*) An alien friend residing in the United Kingdom might by 7 & 8 Vic. c. 66, s. 5, take and hold lands or

¹ Conveyances voidable by them and their representatives, but good until set aside. *Mitchell v. Kingman*, 5 Pick. 431; *Snowden v. Dunlavy*, 11 Pa. St. 522; *Pearl v. M'Dowell*, 3 J. J. Marsh. 658; *Allis v. Billings*, 6 Met. 415; *L'Amoureux v. Crosby*, 2 Paige, 422; *Story*, Eq. Jur. § 228.

² Only the property of the bankrupt at time of assignment vests in assignees. *Ex parte Newhall*, 2 Story, 360; *Mosby v. Steele*, 7 Ala. 299.

As to personal estate.—As to personal estate an alien *friend* might, although an alien *enemy* could not, be the lawful owner of chattels personal, and might exercise the ordinary rights of proprietorship over them, and consequently might create a trust.

“Naturalization Act, 1870.”—Now by the “Naturalization Act, 1870,” (a) which came into operation on 12th May, 1870, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject, (b) and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural born subject, but this is not to “qualify an alien for any office or any municipal, parliamentary, or other franchise,” and the enactment is not to affect any disposition or devolution before the date of the Act. (c)

14. Traitors, felons, and outlaws.—With regard to *Traitors, Felons, and Outlaws*, a distinction by the old law was taken between *real* and *personal* estate. In *high treason*, *lands*, whether held in fee simple, fee tail, (d) or for life, were *upon attainder* forfeited absolutely to the Crown—and in all *other felonies* the profits of the land were *upon attainder* forfeited to the Crown during the *life* of the offender. Subject to these superior rights of the Crown by forfeiture, and to the year, day, and waste of the Crown, (e) *land*, in cases of *petit treason* and *murder*, (and until the statute of 54 G. 3, c. 145, in all cases of felony,) escheated upon the death of the offender, by reason of the corruption of blood caused by houses for residence or occupation by him or his servants, or for the purpose of any business, trade or manufacture for any term not exceeding 21 years.

(a) 33 Vic. c. 14.

[(b) This section enables a foreigner to dispose of property in England by will, but in the case of personality the form of will must, if the testator be domiciled abroad, be subject to the laws of his domicile. In

the goods of Von Buseck, 6 Pr. D. 211; Bloxam v. Farre, 8 Pr. D. 101; 9 Pr. D. 130.]

(c) See as to this Sharp v. St. Sauveur, 7 L. R. Ch. App. 351.

(d) 26 Hen. 8. c. 13. See 2 Bac. Ab. 576, 580.

(e) Attainder was also necessary to entitle the Crown to the year, day and waste. Rex v. Bridger, 1 M. & W. 145.

attainder, pro defectu tenentis, to the lord of the fee, if it was held in fee; but if he held in tail, the land upon the death of the offender devolved upon the issue in tail. *Attainder* related back to the *time of the offence*, and consequently from that time no valid trust could be created by the offender as against the Crown or the lord in cases of *treason, petit treason, or murder*, nor in cases of other felonies, except subject to the right of the Crown during the offender's life.

As respects the large * number of *felonies* in which *no* [*28] *attainder* took place, the offender, though convicted, might convey (*a*), and therefore might create a valid trust of his real estate. Outlawry upon felony was equivalent to attainder, and drew with it the same consequences (*b*).

As to the *goods and chattels* of traitors, felons, and outlaws, they were forfeited absolutely, but only from the time of conviction, or the declaration of outlawry, and therefore up to that period the traitor, felon, or outlaw, might vest his goods and chattels in a trustee upon trusts; but the law would not allow this power of disposition to be exercised collusively for the purpose of defeating the just rights of the Crown (*c*). The traitor, felon, or outlaw might sell the goods for valuable consideration (*d*); and so he might assign the property upon trust to secure the *bond fide* debt of a creditor (*e*); but the existence of the debt must have been actually proved, and the mere recital of it in the security was not sufficient (*f*). An assignment upon a meritorious consideration, as a bargain and sale to a trustee for the purpose of making provision for a son, would not support the deed (*g*). *Outlawry* in *misdemeanors* and *civil actions* (*h*) was a contempt of Court, and worked a forfeiture of the profits of the offender's lands for his life, and of his goods and chattels, absolutely. The person so outlawed, therefore,

(a) *Rex v. Bridger*, 1 M. & W. 145.

(b) See Co. Lit. 390, b; *Holloway's case*, 3 Mod. 42; *King v. Ayloff*, 3 Mod. 72.

(c) See *Saunders's estate*, 4 Giff. 179; and 1 N. R. 256; *Barnett v. Blake*, 2 Dr. & Sm. 117; and see *Anon.* 2 Sim. N. S. 71.

(d) *Hawk. Pl. of Cr. book 2, c. 49.*

(e) *Perkins v. Bradley*, 1 Hare. 219; *Whitaker v. Wisbey*, 12 C. B. 44; *Chownes v. Bayles*, 31 Beav. 351.

(f) *Shaw v. Bran*, 1 Stark. 320.

(g) *Jones v. Ashurst*, Skinn. 357.

[(h) Now by 42 & 43 Vic. c. 59, outlawry in civil proceedings has been abolished.]

could not from that time affect the pendency of the profits of his real estate, or make any settlement of his personal estate.

15. 33 & 34 Vict. c. 23. — Now, by 33 & 34 Vict. c. 23, it is enacted by sect. 1 that “from and after the passing of the Act (4th July, 1870), no confession, verdict, inquest, conviction or judgment of or for any treason or felony, or *felo de se*, shall cause any *attainder* or corruption of blood, or any *forfeiture* or *escheat*, provided that nothing in the Act shall affect the law of forfeiture consequent upon *outlawry*.”

After defining by sect. 6, a “convict” to be “any person against whom, after the passing of the Act, judgment of death or of penal servitude, shall have been pronounced upon a charge of treason or felony,” the Act proceeds by sect. 8

to declare that a convict, while he is such, shall not [*29] bring any *action* or *suit* for recovery of any *property, debt, or damage, and shall be incapable of *alienation* (a) and then sect. 9 empowers the Crown to appoint “an *administrator*” of the convict’s property, in whom, upon appointment, all the real and personal estate of the convict is made by sect. 10 to vest, and such administrator is enabled by sect. 12 to let, mortgage, sell, convey, and transfer any part of the convict’s property, and by subsequent sections to pay debts and liabilities, &c., and to make allowances for the support of any wife or child or reputed child, or other relative or reputed relative of such convict dependent upon him for support, or for the benefit of the convict himself while at large upon licence.

Subject as above, the property is, by sect. 18, to be held in trust for the convict, his heirs, or legal personal representatives, or other persons entitled; and on his ceasing to be subject to the operation of the Act (see sect. 7) is to revert in the convict or the persons claiming under him.

In the absence of an administrator appointed by the Crown, an “*interim curator*” may, by sect. 21, be appointed by Justices of the Peace in Petty Sessions, and by sect. 24

[(a) This, however, will not prevent the convict from paying his debts and applying his property for that purpose. The object of the section is to

prevent the convict from improperly diverting his property either from his creditors or from his family. *Ex parte Graves*, 19 Ch. D. 1.]

such curator is to sue or defend suits, sign discharges for income or debts, and generally manage the convict's property, make allowances for the maintenance of a wife or child, &c., and by sect. 25 may sell any personal property of the convict, but not without the sanction of a Justice or a Court of competent jurisdiction.

SECTION II.

WHO MAY BE A TRUSTEE.

Who may be a trustee. — The question who may be a trustee involves a variety of considerations. Thus, a person to be a trustee must be capable of *taking* and *holding* the property of which the trust is declared.¹ Again, the trustee should be competent to deal with the estate as required by the trust or as directed by the beneficiaries, whereas certain classes are by nature or by the rules of law under disability. Again, the execution of the trust may call for the application or judgment * and a knowledge of busi- [*30] ness. And again, the trustee ought to be amenable to the jurisdiction of the Court which administers trusts. In general terms, therefore, a trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and domiciled within the jurisdiction of a Court of Equity. With this outline we proceed to consider certain exceptional cases where the fitness for the trusteeship may more or less be called into question.

1. **The Crown.** — The *Sovereign*² may sustain the character of a trustee, so far as regards the *capacity* to take the estate, and to execute the trust; but great doubts have been enter-

¹ A trust will never fail for want of a trustee, and any one who can hold a legal title may be a trustee. *Kerr v. Day*, 14 Pa. St. 114; *Gibbs v. Marsh*, 2 Met. 243; *King v. Donnelly*, 5 Paige, 46; *Treat's App.* 30 Conn. 113; *Malin v. Malin*, 1 Wend. 625; *Huntly v. Huntly*, 8 Ired. Eq. 260; *Adams v. Adams*, 21 Wall. 186; *Piatt v. Vattier*, 9 Pet. 405; *Livingston v. Livingston*, 2 John. Ch. 537; *Bundy v. Bundy*, 38 N. Y. 410; *Dunbar v. Soule*, 129 Mass. 284.

² A state may be a trustee. *Hill on Trustees*, 50; *Briggs v. Light-Boats*, 11 Allen, 157; *McDonogh's Ex'rs v. Murdoch*, 15 How. 367. But see as to the United States, *Levy v. Levy*, 33 N. Y. 97; *Shoemaker v. Commissioners*, 36 Ind. 176.

tained whether the subject can, by any legal process, enforce the performance of the trust. The *right* of the *cestui que trust* is sufficiently clear, but the defect lies in the *remedy* (a). A Court of Equity has no jurisdiction over the king's conscience, for that it is a power delegated by the king to the chancellor to exercise the king's equitable authority betwixt subject and subject (b). The old Court of Exchequer had, in its character of a court of revenue, an especial superintendence over the royal property; and it has been thought that through that channel a *cestui que trust* might indirectly obtain the relief to which, on the general principles of equity, he was confessedly entitled. No such jurisdiction, however, appears to have been known when Lord Hale was Chief Baron (c). Lord Hardwicke once observed in Chancery "I will not decree a trust against the Crown in *this Court*, but it is a notion established in courts of *revenue* by modern decisions that the king may be a royal trustee" (d); but the doctrine was still unsettled in the time of Lord Northington (e); and in a more recent case (f), it was decided that though the Court of Exchequer could decree the *possession* of the property according to the equitable title, it had no jurisdiction to direct the Crown to *convey* the legal estate.

The subject may undoubtedly appeal to the sovereign [31] by presenting a petition of right (g), and it * cannot be supposed that the fountain of justice would not do justice (a).

(a) Paulett v. Attorney-General, Hard. 467, 469; Burgess v. Wheate, 1 Ed. 255; Kildare v. Eustace, 1 Vern. 439; [and see Rustomjee v. The Queen, 2 Q. B. D. 69, where it was held that in Sovereign acts, such as the making and performing of a treaty with another Sovereign, the Crown could not be a trustee for a subject].

(b) Said by counsel in Paulett v. Attorney-General, Hard. 468.

(c) See Paulett v. Attorney-General, Hard. 467, 469; and see Wilkes' case, Lane, 54.

(d) Penn v. Lord Baltimore, 1 Ves. 453; and see Reeve v. Attorney-Gen-

eral, 2 Atk. 224; Hovenden v. Lord Annesley, 2 Sch. & Lef. 617.

(e) See Burgess v. Wheate, 1 Ed. 255.

(f) Hodge v. Attorney-General, 3 Y. & C. 342.

(g) As to the transfer of the equity jurisdiction of the Court of Exchequer to the Court of Chancery, see 5 Vic. c. 5, s. 1; and Attorney-General v. Corporation of London, 8 Beav. 270, 1 H. L. Ca. 440. As to petitions of right, see 23 & 24 Vic. c. 34.

(a) Scounden v. Hawley, Comb. 172, per Dolben, J.; Reeve v. Attorney-General, cited Penn v. Lord Baltimore, 1 Ves. 446.

2. *Corporations.* — A corporation¹ could not have been seised to a use, for, as was gravely observed, it had no *soul*, and how then could any confidence be reposed in it? But the technical rules upon which this doctrine proceeded, have long since ceased to operate in respect of trusts; and at the present day every body corporate, whether civil or ecclesiastical (*b*), is compellable in equity to carry the intention into execution (*c*). “A trust,” said Lord Romilly, “may be of two characters, it may be of a general character or of a private and individual character. A person might leave a sum of money to a Corporation in trust to support the children of A. B., and pay them the principal at 21. That would be a private and particular trust which the children could enforce against the corporation if the corporation applied the property to its own benefit. On the other hand, a person might leave money to a corporation in trust for the benefit of the inhabitants of a particular place, or for paving or lighting the town. That would be a public trust for the benefit of all the inhabitants, and the proper form of suit in the event

(*b*) *Attorney-General v. St. John's Hosp.* 2 De G. J. & S. 621.

(*c*) See *Attorney-General v. Landerfield*, 9 Mod. 286; *Dummer v. Corporation of Chippenham*, 14 Ves. 252; *Green v. Rutherford*, 1 Ves. 468; *Attorney-General v. Whorwood*,

1 Ves. 536; *Attorney-General v. Mayor of Stafford*, Barn. 33; *Attorney-General v. Foundling Hospital*, 2 Ves. jun. 46; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499; *Attorney-General v. Caius College*, 2 Keen, 165.

¹ Corporations may act as trustees, if not inconsistent with their purposes or contrary to their charters. *Trustees v. King*, 12 Mass. 540; *Dublin Case*, 38 N. H. 577; *Vidal v. Girard*, 2 How. 187; *In re Howe*, 1 Paige, 214; *In re Newark Sav. Inst.* 28 N. J. Eq. 552; *Society v. Atwater*, 23 Conn. 34; *Greenville Acad.* 7 Rich. Eq. 476. Cities and towns may be trustees. *School v. Canal Co.* 9 Ohio, 217; *Webb v. Neal*, 5 Allen, 575; *Sutton v. Cole*, 3 Pick. 232; *Sudbury v. Belknap*, 1 Pick. 512; *Newhall v. Wheeler*, 7 Mass. 189; *Norton v. Leonard*, 12 Pick. 152; *Allen v. Macy*, 109 Ind. 559; *Piper v. Moulton*, 72 Me. 155; *Perin v. McMicken*, 15 La. Ann. 154. So may overseers of the poor, trustees of school funds and banks. *No. Hempstead v. Hempstead*, 2 Wend. 109; *Carmichael v. Trustees*, 3 How. (Miss.) 84; *Morris v. Way*, 16 Ohio, 478; *Dartmouth Coll. v. Woodward*, 4 Wheat. 636; *People v. Ins. Co.* 15 Johns. 358; *Beaty v. Knowler*, 4 Pet. 152. In case a corporation may not be a trustee, its title is good against outside parties, but as the trust cannot be enforced, a new trustee will be appointed. *Harpending v. Dutch Church*, 16 Pet. 492; *Perin v. Carey*, 24 How. 465; *Chapin v. School Dist.* 35 N. H. 445; *Winslow v. Cummings*, 3 Cush. 358. So may unincorporated associations. *Tucker v. Seaman's Aid Soc.* 7 Met. 188; *Burbank v. Whitney*, 24 Pick. 146; *Inglis v. Snug Harbour*, 3 Pet. 114; *State v. Rusk*, 23 Wis. 636.

of any breach of trust would be an *information* by the Attorney-General at the instance of all or some of the persons interested in the matter. If there was a particular trust in favor of particular persons and they were too numerous for all to be made parties, one or two might then sue, on behalf of themselves and the other *cestuis que trust*, for the performance of the trust (*d*)."

5 & 6 W. 4, c. 76. — Since the Municipal Corporations Act every municipal corporation named in the schedules to the Act (*e*), has *become a trustee*, and has now no longer the power to alienate and dispose of its property, except with the sanction of the lords of the Treasury, but is bound to apply it to certain public purposes pointed out by the Act; and if there be any misapplication, there lies a remedy in Equity by *information* (*f*).

[*32] * **Licence of the Crown.** — Although the Court has ample jurisdiction to oblige a corporation to observe good faith, and the property already vested in a corporate body will be administered upon the trust attached to it, yet no real estate can be conveyed to a corporation upon any trust without the *licence* of the Crown.

But there is no objection to an assignment or bequest of pure *personal* estate to a corporation upon trust.

3. Bank of England. — The Bank of England cannot directly or indirectly be made a trustee of stock. The corporation manages the accounts of the public funds, and is charged with the care of paying the dividends, but refuses, and cannot be compelled by law, to notice any rights but those of the legal proprietors in whose name the stock is standing.

Bank of England cannot be a trustee. — The Company will not enter notice of instruments *inter vivos* upon their books; and though they were formerly obliged by certain Acts of

(*d*) *Evan v. The Corporation of Avon*, 29 Beav. 149.

(*e*) 5 & 6 W. 4 c. 76. Corporations not named in the schedules to the Act may still dispose of their estates. *Evan v. The Corporation of Avon*, *ubi supra*.

(*f*) *Attorney-General v. Aspinwall*, 1 Keen, 513; 2 M. & C. 613; At-

torney-General v. Borough of Poole, 4 M. & C. 17; *Parr v. Attorney-General*, 8 Cl. & Finn. 409; *Attorney-General v. Corporation of Lichfield*, 11 Beav. 120; *Attorney-General v. Mayor of Waterford*, 9 I. R. Eq. 522; [*Attorney-General v. Mayor of Brecon*, 10 Ch. D. 204; *Attorney-General v. Mayor of Stafford*, W. N. 1878, p. 74].

Parliament to enter the wills, or at least extracts from the wills, of deceased proprietors of stock, the object of the legislature, as the Court determined, was not to make the Company responsible for the due administration of the fund according to the equitable right, but to enable them to ascertain who under the will were the persons legally entitled (*a*). Had the construction been otherwise, the Bank of England would have been trustee for half the families in the kingdom. Now by 8 & 9 Vict. c. 97, executors and administrators of a deceased holder of stock are enabled to transfer on producing probate or letters of administration, and the Acts requiring an entry or registration by the Bank of any will or codicil are repealed (*b*).

[National Debt Commissioners and savings banks. — By the Government Annuities Act, 1882 (*c*), s. 8, the National Debt Commissioners or any savings bank are not to be affected by notice of any trust express, implied or constructive affecting any savings bank annuity or insurance (except such trusts as are from time to time recognized by law in relation to deposits in savings banks and except such trusts as are provided for by the Married Women's Property Acts.)]

* 4. Feme covert ought not to be appointed trustee. — [*33]
A *feme covert* may be a trustee, but it would not be advisable to select a *feme covert* (*a*).¹

Has sufficient discretion. — There is here no absolute want of discretion, for a woman has no less judgment after marriage than before (*b*); nay, as was quaintly added by Sir

(*a*) *Hartga v. Bank of England*, 3 Ves. 55; *Bank of England v. Parsons*, 5 Ves. 665; *Bank of England v. Lunn*, 15 Ves. 583, *per* Lord Eldon; *Humberstone v. Chase*, 2 Y. & C. 209.

(*b*) As to the state of the law before this Act, see 3d Edit. p. 32, note (1).

[(*c*) 45 & 46 Vict. c. 51.]

(*a*) *Lake v. De Lambert*, 4 Ves. 595, *per* Lord Loughborough; and see *Re Kaye*, 1 L. R. Ch. App. 387.

(*b*) *Compton v. Collinson*, 2 B. C. C. 387, *per* Buller, J.; *Hearle v. Greenbank*, 1 Ves. 305, *per* Lord Hardwicke; *Bell v. Hyde*, Pr. Ch.

¹ *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Dundas v. Biddle*, 2 Barr. 160; *Livingston v. Livingston*, 2 Johns. Ch. 541; *Clarke v. Saxon*, 1 Hill, Ch. 69; *People v. Webster*, 10 Wend. 554; *Graham v. Long*, 65 Pa. St. 383; *Thompson v. Murray*, 2 Hill, Ch. 214; *Springer v. Berry*, 47 Me. 330; *Groves' Heirs v. Fulsome*, 16 Mo. 543; 57 Am. Dec. 247.

John Trevor, she rather improves it by her husband's teaching (*c*). The reasons upon which her disabilities are founded, are her own interest or her husband's, or both (*d*). Where these are not concerned, she possesses as much legal capacity as if she were perfectly *sui juris*. Thus, she may execute powers simply collateral (*e*), and (somewhat contrary to principle) even powers appendant, or in gross (*f*). Now at law, the trustee is considered as the sole and absolute proprietor, and therefore he can have no power that does not flow from the legal ownership; but in equity, the absolute interest is vested in the *cestui que trust*, and, as the trustee is regarded in the light of a mere instrument, any authority communicated to a trustee must have the character of a power simply collateral (*g*). It follows that if a discretionary trust be committed to a *feme covert*, there is nothing to prevent her due administration of it, so far as relates to her legal *judgment and capacity*. At the same time a woman's will is not always her own, and if a trust were confided to a *feme covert*, the husband would, in fact, exercise no little influence; and, indeed, as [in cases not falling within the Married Women's Property Act, 1882], the husband is liable for her breaches of trust, he must, for his own protection, look to the manner in which she discharges the office, and therefore she cannot be allowed to execute the trust without his concurrence (*h*). [This last remark, however, does not apply to the case of a married woman appointed a trustee, or to a *feme sole* trustee, marrying since the recent Act (*i*), in both of which cases the husband is exempted from

330, *per* Sir John Trevor; and see marginal note to *Moore v. Hussey*, Hob. 95; and see *Needler v. Bishop of Winchester*, Hob. 225.

(*c*) *Bell v. Hyde*, Pr. Ch. 330.

(*d*) *Compton v. Collinson*, 2 B. C. C. 387, *per* Buller, J.

(*e*) Co. Lit. 112, a; *ib.* 187, b; *Lord Antrim v. Duke of Buckingham*, 2 Freem. 108, *per* Lord Keeper Bridgman; *Blithe's case*, *ib.* 91, *vid.* 2d resolution; *Godolphin v. Godolphin*, 1 Ves. 23, *per* Lord Hardwicke.

(*f*) See Sugden on Powers, c. 5, sect. 1, 8th Ed.

(*g*) See *infra*.

(*h*) See *Smith v. Smith*, 21 Beav. 385; *Drummond v. Tracy*, Johns. 608; *Kingham v. Lee*, 15 Sim. 401; *Avery v. Griffin*, 6 L. R. Eq. 606; *Lloyd v. Pughe*, 8 L. R. Ch. App. 88; *Wainford v. Heyl*, 20 L. R. Eq. 321; [*Re Smith's Estate*, 48 L. J. N. S. Ch. 205].

[(*i*) 45 & 46 Vict. c. 75, ss. 1, 18, 24.]

all liability in respect of her *breaches of trust committed during the coverture, unless he has acted or intermeddled in the trust; but the relief afforded to the husband by the Act has, by taking away from the *cestuis que trust* the security of the husband's liability, made the appointment of a married woman to be a trustee, at least as impolitic as it was before the Act.]

Her inability to pass the legal estate.— But further the appointment of a *feme covert* [was, prior to the recent Act,] attended with inconvenience from her inability (except with the concurrence of her husband and through expensive forms) to join in the requisite assurances. At common law, if land be vested in a *feme covert* upon *condition* to enfeof another, she may execute the feoffment by her own act, without the intervention of her husband (*a*); and hence it has been argued, that, in the case of a trust, she may, equally without her husband's concurrence, convey the estate to the parties *equitably* entitled (*b*). But between the two cases there is this clear and obvious distinction, that a *condition* is part and parcel of the common law, while a *trust* is only recognized in the *forum* of a court of equity; except, therefore, the trust be so worded as to bear the construction of a legal condition, it seems impossible to contend that an instrument otherwise inoperative should, from the mere circumstance of the trust, which a court of law cannot notice, acquire a validity (*c*).

5. Feme covert a trustee for sale.— Should a *feme covert*, [married before the recent Act, be in respect of a trust created before the Act], a trustee for sale, it would seem, if these views be correct, that she can *exercise the discretion*, and with the aid of the Fines and Recoveries Act, which requires the concurrence of the husband, can pass the *estate*. But there remains the consideration to whom the purchase-money is to be paid, and who is to sign the receipt. If it

(*a*) *Daniel v. Ubley*, Sir W. Jones, 137.

(*b*) *Daniel v. Ubley*, Sir W. Jones, 138, *per* Whitlock, and Dodridge, J.

(*c*) See Mr. Hargrave's Observa-

tions, Co. Lit. 112, a, note (6); and Mr. Fonblanque's Treat. on Equity, vol. i. p. 92; *McNeillie v. Acton*, 2 Eq. Re. 25.

be paid to the husband it passes into the hands of a stranger, and if it be paid to the wife, the law immediately transfers it to the husband who is a stranger. If any receipt be taken it should be the joint receipt of the husband and wife (*d*). But the safest course would be to pay the money to the account of the wife at some responsible bank, made payable upon the joint receipt of the husband and wife, and to remain there until required for the purposes of the trust, and if the husband and wife took it out of the bank for any purpose he would be liable as for a breach of trust.¹

[*35] * When the husband is a lunatic or idiot, or living apart from the wife, or otherwise incapable (as from infancy (*a*), or from being abroad and not heard of for years (*b*)), of joining in the execution of a deed, the [High Court of Justice (*c*)] has power to dispense with the husband's concurrence, [in which case the deed need not be acknowledged by the *feme covert* (*d*)]. The Court has frequently exercised this jurisdiction by enabling a *feme covert* entitled to freeholds or copyholds (*e*), in fee simple (*f*), in fee tail (*g*), or for life, either in possession or reversion (*h*), or to dower (*i*), or to leaseholds (*j*), [or to personal estate falling under 20 & 21 Vict. c. 57] (*k*), "by deed or surrender, to dispose of release, or surrender all *her* estate and interest" (the words

(*d*) See *Drummond v. Tracy*, Johns. 611.

(*a*) *Re Haigh*, 2 C. B. N. S. 198.

(*b*) *Re Harriet Hedges*, W. N. 1867, p. 19; *Re Tarboton*, W. N. 1867, p. 276; *Ex parte Robinson*, 4 L. R. C. P. 205.

[(*c*) This jurisdiction, originally given to the Court of Common Pleas by the Fines and Recoveries Act, s. 91, has been transferred to the High Court of Justice by the "Supreme Court of Judicature Act, 1873." See *Ex parte Thompson*, W. N. 1884, p. 28.]

[(*d*) *Goodchild v. Dougal*, 3 Ch. D. 650.]

(*e*) *Ex parte Shuttleworth*, 4 Moore and Scott, 332, note.

(*f*) *Re Kelsey*, 16 C. B. 197; *Re Cloud*, 15 C. B. N. S. 833; *Re Woodall*, 3 C. B. 639; *Re Woodcock*, 1 C. B. 437.

(*g*) *Ex parte Thomas*, 4 Moore and Scott, 331.

(*h*) *Ex parte Gill*, 1 Bing. N. C. 168.

(*i*) *Re Turner*, 3 C. B. 639.

(*j*) *Re Harriet Hedges*, W. N. 1867, p. 19.

[(*k*) *Re Alice Rogers*, 1 L. R. C. P. 47; *Ex parte Alice Cockerell*, 4 C. P. D. 39.]

¹ Still *v. Ruby*, 35 Pa. St. 373; *Drummond v. Tracy*, 1 Johns. 611; *Griffith v. Griffith*, 5 B. Mon. 113; *Shirley v. Shirley*, 9 Paige, 363; *Picquet v. Swan*, 4 Mason, 455; see statutes in reference to married women in the various states.

of the order on one occasion) (*l*), in the premises. The order therefore will not affect the husband's curtesy, if any (*m*). The Court will not direct the *form* of conveyance (*n*), but it looks to the propriety of the order with reference to each particular estate, and it will not give the *feme covert* a roving power of disposition over *any* property which she may happen to have (*o*). In most cases the Court has made the order to enable the wife to deal with her own property for her maintenance, but in other cases the court has enabled the *feme covert* to execute a trust (*p*): and it would seem therefore that where there is an incapacity of the husband to join in a deed, the **feme covert* (who [36] has no want of discretion) can execute the trust by the aid of the Court.

6. **Bare Trustee.** — By 37 & 38 Vict. c. 78. s. 6, it is enacted that when any *freehold* or *copyhold* hereditaments shall be vested in a married woman as a *bare trustee*, she may convey or surrender the same as if she were a *feme sole*.¹

[7. **Married Women's Property Act.** — Now by Sect. 18 of the Married Women's Property Act, 1852 (*a*), a married woman who is an executrix or administratrix alone, or jointly with any other person, may transfer or join in transferring any annuity or bank deposit, or any part of the public stocks or funds, or of the stocks or funds of any bank, or any share stock debenture, debenture stock, or other benefit right claim

(*l*) *Re Kelsey*, 16 C. B. 197.

[(*m*) By sect. 91 of the Fines and Recoveries Act, all deeds executed by the wife in pursuance of the order shall (but without prejudice to the rights of the husband as then existing independently of the act) be as good and valid as they would have been if the husband had concurred. The words in parenthesis have occasioned some difficulty, but it is conceived that the only rights of the husband reserved by them are such rights as he is entitled to by virtue of an independent interest, and that the wife's deed passes all such estate and inter-

est as she is by sect. 77 empowered to dispose of with the husband's consent. See *Goodchild v. Dougal*, 3 Ch. D. 650; and see also *Re Jakeman's Trusts*, 23 Ch. D. 344; and see *Fowke v. Draycott*, 33 W. R. 701; 29 Ch. D. 906, where it was held that the wife's disposition did not deprive the husband of the common-law rights which he had acquired by the coverture.]

(*n*) *Re Turner*, 3 C. B. 166.

(*o*) *Re Cloud*, 15 C. B. N. S. 833.

(*p*) *Re Mirfin*, 4 M. & G. 635; *Re Haigh*, 2 C. B. N. S. 198; [*Re Caine* 10 Q. B. D. 284.]

[(*a*) 45 & 46 Vict. c. 75.]

¹ See *Re Docwra*, 29 Ch. D. 693.

or other interest of or in any corporation, company, public body or society, without her husband as if she were a *feme sole*; and this seems to apply to trusts in existence at the time the Act was passed.

8. Where the *feme* has been married or the trust has been undertaken by her since the commencement of the Married Women's Property Act, 1882 (1 January, 1883), she can execute the trust without the concurrence of her husband, and as if she were a *feme sole* (b). Where therefore she is a trustee for sale she can exercise the discretion, pass the estate, and sign a good receipt for the purchase-money.]

9. *Feme sole*. — It is almost equally undesirable to appoint a *feme* who is single a trustee, for should she marry, [she would be liable to be influenced by her husband who, so long as he abstained from active interference, would be under no liability to make good any breaches of trust committed by her during the coverture.] The Court at *one time refused to appoint a *feme sole* a trustee, as, in the event of her marriage [it might lead to inconvenience as the husband would have the power of interfering] (a). But in a more recent case the M. R., after consulting with the other judges, appointed a *feme sole* a trustee (b), and the Lords Justices have since made a similar order (c).

[(b) 45 & 46 Vict. c. 75, ss. 1, 2, 5, 24. See *Kingsman v. Kingsman*, 6 Q. B. D. 122, 128. It is open to argument whether the 2d and 5th sections of the act apply to trust property, more particularly as the 18th section enables a married woman who is an executrix, administratrix, or trustee, to sue and be sued, and to transfer the trust property in certain special cases without her husband, as if she were a *feme sole*, and this section is to some extent redundant if the 2d and 5th sections apply to trust property. It is, however, clear from the 1st and 24th sections that a married woman may accept a trust, or the office of executrix or administratrix, as if she were a *feme sole*; and that her husband is exempted from all liabilities in respect of her breaches

of trust, so long as he does not act or intermeddle in the trust; and it would be a highly inconvenient construction of the act to hold that a married woman is not empowered to acquire, hold, and dispose of the trust property generally without the concurrence of her husband. And inasmuch as the language of sections 2 and 5 is wide enough to include trust property, it is conceived that any inference to be drawn from section 18 is not sufficient to restrict the operation of sections 2 and 5 to property belonging to married women beneficially. So now decided. *Re Docwra*, 29 Ch. D. 693.]

(a) *Brook v. Brook*, 1 Beav. 531.

(b) *Re Campbell's Trusts*, 31 Beav. 176.

(c) *In re Berkley*, 9 L. R. Ch. App. 720.

10. **Infant ought not to be appointed Trustee.** — **Has no legal discretion.** — An *infant* labors under still greater disability than a *feme covert*; for, first, as regards *judgment and discretion*, a *feme* is admitted to *have* capacity, though she cannot in all cases freely exercise it; but an infant is said altogether to *want* capacity (*d*). An infant cannot be steward of the court of a manor (*e*), or attorney for a person in a suit (*f*), or guardian to a minor (*g*), or be a bailiff or receiver (*h*); but can only discharge such acts as are merely ministerial, as to be an attorney to deliver seisin (*i*), or as a lord of a manor to give effect to a custom (*j*), or to appoint a seneschal (*k*). So he might, until an act to the contrary (*l*), have been, as executor, the channel or conduit pipe through which the assets found their way to the hands of creditors in a due course of administration (*m*); but had he acted otherwise than ministerially, as by signing an acquittance without receipt of the money, such an exercise of discretion had been actually void (*n*). [However, an infant may exercise a power simply collateral over both real and personal estate (*o*), and as to personal estate he may exercise a power in gross notwithstanding that it may involve the application of discretion (*p*), but as to real estate it would seem that such a power could not be exercised unless expressly authorized by the instrument creating the power (*q*). And where an intention * appears that [*38]

(*d*) *Hearle v. Greenbank*, 3 Atk. 712, and 1 Ves. 305, *per* Lord Hardwicke; *Grange v. Tiving*, O. Bridg. 108, *per* Sir O. Bridgman; *Compton v. Collinson*, 2 B. C. C. 887, *per* Buller, J.; and see *Socket v. Wray*, 4 B. C. C. 486.

(*e*) Co. Lit. 3, b; and see Mr. Hargrave's note (4), *ib.* But acts done by an infant in the character of steward cannot be avoided by reason of his disability. *Eddleston v. Collins*, 3 De G. M. & G. 1.

(*f*) Co. Lit. 128, a; Br. Ab. "Covert. and Infant," pl. 55, and see *Hearle v. Greenbank*, 3 Atk. 710.

(*g*) Co. Lit. 88, b; [but see *Re D'Angibau*, 15 Ch. D. 228, 245.]

(*h*) Co. Lit. 172, a.

(*i*) Co. Lit. 52, a; Br. Ab. "Covert. and Infant," pl. 55.

(*j*) 1 Watk. on Copyh. 24.

(*k*) *Halliburton v. Leslie*, 2 Hog. 252.

(*l*) 38 G. 3. c. 87, s. 6.

(*m*) Toller on Executors, 81.

(*n*) *Russel's case*, 5 Rep. 27, a; Co. Lit. 172, a; *ib.* 264, b; 1 Roll. Ab. 730, F. 2.

[(*o*) Sugd. on Pow. 8th ed. 177, 911; 1 Preston on Abstracts, 325; *King v. Bellord*, 1 H. & M. 343; *Re D'Angibau*, 15 Ch. D. 228.]

[(*p*) *Re D'Angibau*, *ubi sup.*]

[(*q*) *Hearle v. Greenbank*, 3 Atk.

the power is to be exercisable notwithstanding infancy, an infant may appoint even although his interest may be affected by the appointment (*a*). A trust which requires the exercise of discretion cannot be executed by an infant (*b*).

11. Power of passing the estate. — Effect of feoffment, or delivery of chattels. — Effect of delivery of a deed — Effect of his assurance without feoffment, delivery, or deed. — With respect to an infant's ability to pass the estate, it seems to be generally agreed that, at common law, a *feoffment* of lands (*c*) or an actual *delivery* of goods and chattels (*d*), is an act of so great solemnity, that it serves to carry the present possession, and is voidable only, and not void. Where the property is of an *incorporeal* nature, as the delivery of the thing itself is impossible, the common law has substituted the kindred precaution of *delivery of the deed*. The effect of a deed delivered by an infant has been much disputed; by some it has been held to be absolutely null and void (*e*), by others to be voidable only (*f*), and by others again to be void or voidable, as the validity of the execution is taken to be for the infant's benefit or not (*g*). Another opinion still (which is that of Perkins (*h*), and was adopted in the case of *Zouch v. Parsons* (*i*), and may be regarded as the doctrine of the present day) is, that an infant's deed, where the delivery of it answers to livery of seisin, and operates as the convey-

695; S. C. 1 Ves. 298; *Re Cardross's Settlement*, 7 Ch. D. 728.]

[(*a*) *Re Cardross's Settlement*, 7 Ch. D. 728; *Re D'Angibau*, 15 Ch. D. 228.]

[(*b*) *King v. Bellord*, 1 H. & M. 343.]

(*c*) *Thompson v. Leach*, 3 Mod. 311, *per Cur.*; Br. Ab. "Covert. and Inf." pl. 1; and see Co. Lit. 42, b, 51, b; *Whittingham's case*, 8 Rep. 42, b; Br. Ab. "Covert. and Inf." pl. 40.

(*d*) *Perk.* 14; Br. Ab. "Covert. and Inf." pl. 1.

(*e*) Br. Ab. "Covert. and Inf." pl. 1 & 10; *Lloyd v. Gregory*, Cro. Car. 502, *per Cur.*; *Thompson v. Leach*, 3 Mod. 310, *per Cur.* See observations on the last two cases in *Zouch v.*

Parsons, 3 Burr. 1806 & 1807; and see *Humphreston's case*, 2 Leon. 216.

(*f*) *Norton v. Turvill*, 2 P. W. 145, *per Sir J. Jekyll*.

(*g*) See *Zouch v. Parsons*, 3 Burr. 1804; and see *Humphreston's case*, 2 Leon. 216; *Lloyd v. Gregory*, Cro. Car. 502; *Nightingale v. Earl Ferrers*, 3 P. W. 210; *Inman v. Inman*, 15 L. R. Eq. 260.

(*h*) Sects. 12 & 154; and see Br. Ab. "Dum fuit infra ætatem," pl. 1; *id.* "Covert. and Inf." pl. 12; *Stone v. Wythipole*, Cr. El. 126; *Marlow v. Pitfield*, 1 P. W. 559.

(*i*) 3 Burr. 1807; confirmed by the recent case of *Allen v. Allen*, 1 Conn. & Laws. 427, 2 Drur. & War. 307.

ance of an interest, is merely voidable; but where it does not take effect as an assurance by delivery of the deed, as in a power of attorney (*j*), then it is actually void. Lord Mansfield, however, subjoined the qualification, that if a case should arise where it would be more beneficial to the infant that the deed should be considered as void, as if he might incur a forfeiture, or be subject to damage, or a breach of trust in respect of a third person (*k*), unless it was *deemed void, the reason of an infant's privi- [*39] leges would in such case warrant an exception from the rule (*a*). Where the instrument *carries no solemnity with it*, equivalent to feoffment or delivery, the validity of the act must then depend on the question how far the assurance promotes the interest of the infant (*b*).

[12. **Covenant by an infant.** — A covenant by an infant, if for his benefit, is not void but only voidable; and a covenant by an infant *feme*, in contemplation of her marriage, to settle her property to be acquired during the coverture, is binding until it is avoided; and the *feme* may, after attaining twenty-one, and during her coverture, either avoid the covenant or ratify it as to any property for the time being belonging to her for her separate use, but prior to the recent Act her ratification would not bind property acquired by her after the time of such ratification (*c*). Since the Married Women's Property Act, 1882 (*d*), it is conceived that the ratification by the *feme covert* of the covenant would bind not only the separate property she had then acquired, but any separate property she might thereafter acquire during the coverture.

13. **Appointing an attorney.** — By a recent Act, a married woman, whether an infant or not, has power, as if she were unmarried and of full age, by deed to appoint an attorney on

(*j*) See Br. Ab. "Covert. and Inf." pl. 1; Whittingham's case, 8 Rep. 45, a.

(*k*) *Quære* if a Court of law could notice a breach of trust. See Warwick v. Richardson, 10 M. & W. 295. [But see now 36 & 37 Vict. c. 66, s. 24.]

(*a*) Zouch v. Parsons, 3 Burr. 1807.

(*b*) Humphreston's case, 2 Leon.

216; and see Lloyd v. Gregory, Cro. Car. 502; Co. Lit. 51, b; Grange v. Tiving, Sir O. Bridg. 117.

[(*c*) Smith v. Lucas, 18 Ch. D. 531; Willoughby v. Middleton, 2 J. & H. 344; Burnaby v. Equitable Reversionary Interest Society, 28 Ch. D. 416.]

[(*d*) 45 & 46 Vict. c. 75.]

her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do (e)].

14. **Infant cannot be guilty of a breach of trust.**—Another objection to an infant trustee is, that he cannot be decreed to make satisfaction on the ground of a breach of trust (f). However, an infant has no privilege to cheat men (g), and therefore he will not be protected, if he be old and cunning enough to contrive a fraud (h).

Consequent presumption that he takes not as trustee, but beneficially.—From the great inconveniences attending the appointment of an infant as trustee, there arises a [*40] strong presumption wherever *property is given to an infant, that he is intended to take it *not as trustee*, but *beneficially* (a).

15. **Alien formerly trustee of chattels personal only.**—An *alien* until a recent act (b) could not effectually be a trustee in respect of freeholders or chattels real, for the policy of the law would not allow an alien to sue or be sued to the prejudice of the Crown touching lands in any court of law or equity (c); and on inquisition found, the legal estate of the property vested by forfeiture in the Crown.¹

[(e) 44 & 45 Vict. c. 41, s. 40.]

(f) See *Whitmore v. Weld*, 1 Vern. 328; *Russell's case*, 5 Rep. 27, a; *Hindmarsh v. Southgate*, 3 Russ. 324.

(g) *Evroy v. Nicholas*, 2 Eq. Ca. Ab. 480, *per* Lord King.

(h) See *Cory v. Gertcken*, 2 Mad. 40; *Evroy v. Nicholas*, 2 Eq. Ca. Ab. 488; *Earl of Buckingham v. Drury*, 2 Ed. 71, 72; *Clare v. Earl of Bedford*, 13 Vin. 530; *Watts v. Cresswell*, 9 Vin. 415; *Beckett v. Cordley*, 1 B. C. C. 358; *Savage v. Foster*, 9 Mod. 87; *Overton v. Banister*, 3 Hare, 503; *Stikeman v. Dawson*, 1 De G. & Sm.

503; *Wright v. Snowe*, 2 De G. & Sm. 321; *Davies v. Hodgson*, 25 Beav. 177; *Re Constantinople & Alexandra Hotel Co.*, *Ebbett's case*, 18 W. R. 202; 21 L. T. N. S. 574; [*Lemprière v. Lange*, 12 Ch. D. 675.]

(a) *Lamplugh v. Lamplugh*, 1 P. W. 112; *Blinkhorne v. Feast*, 2 Ves. sen. 30; *Mumma v. Mumma*, 2 Vern. 19; *Taylor v. Taylor*, 1 Atk. 386; *Smith v. King*, 16 East, 283; and see *King v. Denison*, 1 V. & B. 278.

(b) 33 Vict. c. 14.

(c) *Gilb. on Uses*, 43; and see *Fish v. Klein*, 2 Mer. 431.

¹ *Foss v. Crisp*, 20 Pick. 121; *Trimbles v. Harrison*, 1 B. Mon. 140; *Smith v. Zaner*, 4 Ala. 99; *Waugh v. Riley*, 8 Met. 290; *Dunlop v. Hepburn*, 3 Wheat. 231; *Montgomery v. Dorion*, 7 N. H. 475; *Hughes v. Edwards*, 9 Wheat. 489; *Ferguson v. Franklins*, 6 Munf. 305. A devise to an alien vests title. *Stephen v. Swann*, 9 Leigh. 404; *Vaux v. Nesbit*, 1 McC. Ch. 352. Will not vest title. *Atkins v. Kron*, 2 Ired. Ch. 58; *Craig v. Radford*, 3 Wheat. 594. Even an alien enemy may be a trustee. *Buford v. Speed*, 11 Bush. 338.

Real estate devised to British subject and alien upon trust. — In a case where a testator devised real estate to his wife and an *alien* upon trust to sell, and they sold accordingly, and executed a conveyance; a question afterwards arose whether the purchaser had a good title, and with the view of curing the defect an Act of Naturalization was obtained; but it was held, that the common form of the Act of Naturalization did not confirm the purchaser's title *retrospectively*, but that the objection remained. The parties had endeavored to introduce into the bill special words to meet the case, but a departure from the usual course was found impracticable (*d*).

Chattels personal. — In respect of chattels *personal* there was never any objection to an *alien* friend as trustee as regards his ability either to take or to hold the estate.

33 V. c. 14. — Now by 33 Vict. c. 14, sect. 1, an alien may take, acquire, hold, and dispose of *real* and personal property of every description, in the same manner as if he were a natural born subject. The objection, therefore, to an alien being a trustee of freeholds or chattels real has been removed.

Person domiciled abroad not a fit trustee. — If, however, the alien be domiciled abroad, it is an objection to his *fitness* for the office of trustee, as he is not amenable to the jurisdiction of the Court (*e*).

16. Bankrupts not absolutely disqualified. — Bankrupts may be appointed trustees, should any one be disposed to commit the administration of his property to those who have not been sufficiently careful in the management of their own. The past or any subsequent act of bankruptcy will have no operation upon the trust estate.¹

17. Cestuis que trust should not, as a general rule, be appointed trustees. — *Cestuis que trust* are not, as such, incapacitated from being trustees for themselves and others;

(*d*) *Fish v. Klein*, 2 Mer. 431.

Re Harrison's Trust, 22 L. J. N. S. Ch.

(*e*) See *Meinertzhagen v. Davis*, 1 Coll. 335; *Re Guibert*, 16 Jur. 852;

69; *Curtis' Trusts*, 5 I. R. Eq. 429.

¹ *Blin v. Pierce*, 20 Vt. 25; *Lounsbury v. Purdy*, 11 Barb. 490; *Hogan v. Wyman*, 2 Ore. 302; *Ludwig v. Highley*, 5 Barr. 132; *Bank v. Mumford*, 2 Barb. Ch. 596.

[*41] but, as a general rule, they are *not altogether fit persons for the office, in consequence of the probability of a conflict between their interest and their duty (a).¹

18. **Relatives.**—Sir John Romilly, M.R., considered it also objectionable to appoint any *relative* a trustee, from the frequency of breaches of trust committed by trustees at the instance of *cestuis que trust* nearly connected with them (b).

However, there is no positive legal objection to appointing either a *cestui que trust* or a relative, and indeed it is not always easy to find a trustee who is neither a *cestui que trust* nor a relative, and this the Court itself has experienced; for, notwithstanding its repugnance to such a course, it has been obliged occasionally, to appoint a relative, who is also a *cestui que trust*, to be a trustee (c). In one case the Court, in appointing two new trustees, allowed the *husband* of a *cestui que trust* to be one of them upon his undertaking, that, if he became sole trustee, he would immediately take steps for the appointment of a co-trustee (d),² [and in another case the appointment was made with a direction, that in case the husband should become sole trustee, a new trustee should forthwith be appointed (e). But in a recent case in Lunacy, where three new trustees were appointed, the Court allowed the husband of the tenant for life to be one of them, without requiring any such undertaking (f);] and in other cases the *husbands* of *cestuis que trust* in remainder have been appointed trustees (g); [but the late Master of the Rolls refused, in a recent case, to appoint a man a trustee of his own marriage settlement, though all the persons interested assented to the

(a) *Foster v. Abraham*, 17 L. R. Eq. 351.

(b) *Wilding v. Bolder*, 21 Beav. 222.

(c) *Ex parte Clutton*, 17 Jurist, 988; *Ex parte Conybeare's settlement*, 1 W. R. 458; *Re Clissold*, 10 L. T. N. S. 642; and see *Re Lancaster Charities*, 9 W. R. 192; *Passingham v. Sherborn*, 9 Beav. 424; *Barnes v. Addy*, 9 L. R. Ch. App. 244.

(d) *Re Hattatt's Trusts*, 18 W. R. 416; 21 L. T. N. S. 781 [and see *Re Burgess' Trust*, W. N. 1877, p. 87. *Re Lightbody's Trusts*, 33 W. R. 452].

[(e) *Re Parrott*, W. N. 1881, p. 158.]

[(f) *Re Jesson*, 7 Aug. 1878, M. S.]

(g) *Re Davis' Trusts*, 12 L. R. Eq. 214; [*Re Sarah Knight's Will*, 28 Ch. D. 82.]

¹ *Craig v. Hone*, 2 Edw. Ch. 554; *Perry on Trusts*, § 59.

² *Porter v. Bank*, 19 Vt. 410; *Dean v. Lanford*, 9 Rich. Eq. 423.

application, and no other person could be found to accept the office, on the ground that the wife, who had a life interest to her separate use without power of anticipation, would not be properly protected (*h*).

[**Settled Land Act.**]—A tenant for life of settled land will not be appointed by the Court a trustee of the settlement under the Settled Land Act, 1882 (*i*). And in one case the Court refused to appoint two brothers trustees, and said there must be two independent *trustees (*a*). [*42] In a recent case the Court refused to sanction the appointment by a continuing trustee, who was a solicitor and acted as such for the trust and for some of the *beneficiaries*, of his son and partner, who was also a solicitor, as a co-trustee in the place of the retiring trustee, but intimated that such an appointment made *bond fide* out of Court would be valid (*b*).

19. [**Charity.**—Where a charity has been founded for the purpose of teaching or expounding certain religious doctrines, or for the exclusive benefit of persons holding certain religious views, the trusteeship of the charity should be confined to persons holding those doctrines or views (*c*), and the same rule would seem to apply where the religious object of the charity is the primary object, though there may be a secondary object, as for instance the repairing of roads, which can be administered as well by persons of one sect or religious belief as of another. But where the object of the charity is eleemosynary, and it is not restricted to persons of any particular religious denomination, the trusteeship need not be confined to persons holding the doctrines of the church or sect to which the founder belonged, but the most eligible person for the office may be selected without regard to his religious views (*d*).]

[*(h)* *Re Lowdell's Trust*, M. S. S., M. R. 11 June, 1877.]

[*(i)* *Re Harrop's Trusts*, 24 Ch. D. 717.]

[*(a)* *Re Knowles' Settled Estates*, 27 Ch. D. 707.]

[*(b)* *Re Norris*, 27 Ch. D. 338.]

[*(c)* *Re Ilminster Free School*, 4

Jur. N. S. 676; S. C. *nom.* *Baker v. Lee*, 8 H. L. C. 495; *Attorney-General v. Pearson*, 3 Mer. 353; *Attorney-General v. St. John's Hospital, Bath*, 2 Ch. D. 554.]

[*(d)* *Attorney-General v. St. John's Hospital, Bath*, *ubi sup.*]

20. **Proper number of trustees.**— We may here remark, that care should be taken not only to provide for the fitness of the trustee, but also to secure an adequate number of trustees. A single trustee, whether originally appointed such or become so by survivorship, has the absolute and unlimited control at law over the property; and should he become involved in difficulties, he is under a temptation which, notwithstanding recent penal enactments, must still be regarded as strong, to sustain his credit by resorting to a fund of which he can with certainty possess himself, and without fear of immediate detection. The fallacious hope of replacing the money before the day of payment arrives, has lulled the conscience of many, not the worst of mankind, when suffering under the pressure of poverty. There can be no objection to the appointment of a single trustee, where the trust reposed in him is merely a nominal confidence; but where the administration of the trust involves the receipt and custody of money, the safeguard of at least two trustees ought never to be dispensed with (e).

[*43] *** Appointment of new trustees.**— And on the death of one of the original trustees, no time should be lost in restoring the fund to its proper security by the substitution of a new trustee, a precaution, it is feared, but too frequently neglected, from motives of delicacy,—the surviving trustee being sensitive, and conceiving his honesty to be called into question, and the *cestuis que trust*, (often too ignorant of the world to see the necessity of taking precautions against fraud), being apt to suspect their legal adviser of a wish to create business at the expense of the estate.

To guard against the constant recurrence of appointments of new trustees, it is common, at least where the property is considerable, to appoint four trustees originally, for then, on the decease of the first or even a second trustee, an immediate substitution is not very material, but the safe rule is, where money is concerned, always to appoint at least three trustees, and to keep the number full. As regards stock, more than *four* trustees are scarcely ever appointed, and it is a *general*

(e) See *Baillie v. McKewan*, 35 Beav. 183; *Re Dickson's Estate*, 3 L. R. Eq. 345.

rule of the Bank not to allow stock to be transferred into the names of more than four joint proprietors. But in *special* cases so many as five or six have been admitted.

SECTION III.

WHO MAY BE CESTUI QUE TRUST.

1. It may be laid down as a general rule that as *œquitas sequitur legem*, those who are capable of taking the legal estate, may, through the channel of trust, be made recipients of the equitable.

2. *The Crown may be cestui qui trust.*—A trust may be declared in favour of the *Sovereign*.¹ While uses were in their fiduciary state, it was held that in order effectually to limit a use to the Crown, the title must have been matter of record. “It behoveth,” says Lord Bacon, “that both the declaration of the use and the conveyance itself be matter of record, because the king’s title is compounded of both; I say not appearing of record, but by conveyance of record. And, therefore, if I *covenant* with J. S. to levy a fine to him to the king’s use, which I do accordingly, and the *deed of covenant be not enrolled*, and the deed be found by office, the use vesteth not. *E converso*, if enrolled. If I covenant with J. S. to enfeof him to the king’s use, and the deed be enrolled and the feoffment also be found by office, the *use vesteth. But if I levy a fine, or suffer a [*44] recovery to the king’s use, and declare the use by deed of covenant enrolled, though the king be not a party, yet it is good enough” (a). These observations apply only to original gifts of land from a subject to the Crown, and, when the limits of the prerogative were much less accurately defined than they now are, the interposition of such a barrier between the subject and the Crown may have been necessary. Where an equitable interest in real or personal estate (b)

(a) Bac. on Uses, 60; and see Gilb. on Uses, 44, 204.

(b) *Middleton v. Spicer*, 1 B. C. C. 201; *Brummell v. Macpherson*, 5 Russ. 263.

¹ A state may be a *cestui que trust*. *Lamar v. Simpson*, 1 Rich. Eq. 71; *Neillson v. Lagow*, 12 How. 107.

accrued to the Crown by course of law, as by the treason of the subject, or by forfeiture, or on the doctrine of *bona vacantia*, it was not doubted that the Crown could sue without even a previous inquisition. According to Sir T. Clarke, an inquisition was necessary only where the Crown asserting its prerogative chose to make a seizure without interpleading with the subject in Court to establish its title, but where the Crown waiving its prerogative interpleaded with the subject, as by filing a bill, there an inquisition was unnecessary and superfluous (c).

[By the Intestates Estates Act, 1884 (d), the Court is empowered, on the application or with the consent of the Attorney-General, notwithstanding that no office has been found, and no commission issued or executed, to order a sale of any hereditament or any estate or interest therein to which the Crown is entitled, and to dispose of the proceeds of such sale.]

3. **A corporation.**—A trust of lands cannot be limited to a corporation without a license from the Crown, both on general principle, and also by analogy to the statutory enactment as to uses (e). If corporations could take in the *names of trustees* without a license, the rule requiring a license would become a dead letter and the rights of the Crown effectually evaded, for it makes no material difference whether the legal estate be limited to the corporation directly or to a trustee for the corporation.¹

4. **Alien.**—As regards an *alien*, a trust of lands might always have been *declared* in his favour (f), and might as against all but the Crown have been enforced by him [*45] for his own benefit (g); but as the same *mischiefs would follow from an alien's enjoyment of the equi-

(c) *Burgess v. Wheate*, 1 Eden, 188. See now 33 & 34 Vict. c. 23.

[(d) 47 & 48 Vict. c. 71, s. 5.]

(e) See *Shep. Touch.* 509; *Sand. on Uses*, 339, note E.; 15 Ric. II. c. 5.

(f) *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92; and see *Vin. Ab. Alien*, A. 8; *Godfrey and Dixon's case*,

Godb. 275; *Br. Feff. al. Uses*, 389, a, pl. 29.

(g) See *Barrow v. Watkin*, 24 Beav. 1; *Godfrey and Dixon's case*, *Godb.* 275, but see *Gilb. on Uses*, 43; *King v. Holland*, *Al.* 16; *S. C. Styl.* 21; *Burney v. Macdonald*, 15 Sim. 6; *Rittson v. Stordy*, 3 Sm. & Gif. 230.

¹ *Hill on Trustees*, 52; *Coleman v. Railroad Co.* 49 Cal. 518.

table, as of the legal interest in lands (a), the equitable interest might at any time have been claimed by the Crown. The legal estate was not affected (b), but the Crown had the right of suing a *subpœna* against the trustee in equity (c). An alien could not, however, take an equitable interest by *act of law* as by descent or curtesy (d).

Executory trust for alien. — A distinction was taken, that although where a trust was perfected in favour of an alien the Crown might be entitled, yet where a trust in favour of an alien was not in *esse*, but only in *feri* and executory, the court would do no act to give it to the Crown in the right of the alien (e).

Alien might be cestui que trust of proceeds of sale of land. — Where a testator directed an estate to be sold, and the proceeds divided amongst certain persons, some of whom were aliens; there, as according to the intention, which was supposed to be executed at the time of the death, the interest devised was money, the Crown was not entitled, for the mere purpose of working a forfeiture, to exercise an election by retaining the property as land; and therefore, aliens were not debarred from enjoying their legacies in the pecuniary character which the testator had stamped upon them (f).¹

33 Vict. c. 14. — Now by 33 Vict. c. 14, an alien may take, acquire, hold, and dispose of real and personal property of

(a) *Attorney-General v. Sands*, Hard. 495, *per* Lord Hale; *Fourdrin v. Gowdey*, 3 M. & K. 383. See *Burne v. Macdonald*, 15 Sim. 6.

(b) *King v. Holland*, Al. 14; *Sir John Dack's case*, cited *ib.* 16; *Attorney-General v. Sands*, Hard. 495, *per* Lord Hale.

(c) *Sharp v. St. Sauveur*, 7 L. R. Ch. App. 351; *King v. Holland*, Al. 16, *per* Rolle, J.; *Roll. Ab.* 194, pl. 8. See *Burney v. Macdonald*, 15 Sim. 6; *Burgess v. Wheate*, 1 Eden, 188.

(d) See *Calvin's case*, 7 Rep. 49;

Dumoncel v. Dumoncel, 13 Ir. Eq. R. 92. As to dower, see *Co. Lit.* 31 b, note (9) by Harg.

(e) See *Burney v. Macdonald*, 15 Sim. 14; *Rittson v. Stordy*, 3 Sm. & Gif. 240, but see *Barrow v. Wadkin*, 24 Beav. 1; *Sharp v. St. Sauveur*, 7 L. R. Ch. App. 351.

(f) *Du Hourmelin v. Sheldon*, 1 Beav. 79, 4 Myl. & Cr. 525; *Sharp v. St. Sauveur*, 17 W. R. 1002, 20 L. T. N. S. 799, overruled on another ground, 7 L. R. Ch. App. 343, and see *Master v. De Croismar*, 11 Beav. 184.

¹ *Anstice v. Brown*, 6 Paige, 448; *Hubbard v. Goodwin*, 3 Leigh, 492; *Trezevant v. Howard*, 5 Del. 87; *Craig v. Leslie*, 3 Wheat. 563; *Leggett v. Du bois*, 5 Paige, Ch. 114; *Bradwell v. Weeks*, 1 Johns. Ch. 206; *Hamersley v. Lambert*, 2 Johns. Ch. 508; *Taylor v. Benham*, 5 How. 270.

every description in the same manner as if he were a natural born subject. But the Act is not retrospective (*g*).

5. *Distinctions in reference to equitable and legal interests.*

It may be remarked that in certain cases persons are capable of taking an equitable interest, to whom the legal estate could not have been similarly limited.¹ Thus, at common law [until the recent Married Women's Property Acts] no property, real or personal, could be so limited to a married woman, as to exclude the legal rights of the husband during coverture: but, by way of trust, the beneficial interest [*46] could be placed entirely at the disposal of a * married woman, so that she should be regarded as a *feme sole*, and the husband should not participate in the enjoyment.

6. So the *legal* estate cannot be limited to the objects of a charity, as to the poor of a parish, in perpetual succession; but in a court of equity, where the feudal rules do not apply, the intention of the donor will be carried into effect (*a*), provided the requisitions of 9 G. 2. c. 36, be complied with. The act last referred to does not produce any incapacity in the *cestui que trust* to take, but only prohibits the alienation of land, or property savouring of land, in any other mode than that prescribed by the act, for objects falling within the legal definition of charitable purposes.²

(*g*) *Sharp v. St. Sauveur*, 7 L. R. Ch. App. 350; [*De Geer v. Stone*, 22 Ch. D. 243.]

(*a*) *Gilb. on Uses*, 204.

¹ A *cestui que trust* must have a capacity to take. *Trotter v. Blocker*, 6 Port. 269. It may be a trust for self and others. *Cocks v. Barlow*, 5 Rep. 406. If an infant is a *cestui que trust*, the principle of the fund may not be diminished except by order of court, but the infant is entitled to maintenance out of the fund, when his father is insolvent. *Bethea v. McCall*, 5 Ala. 308. The *cestui que trust* need not be in being at the time the trust is declared, if he is in existence at the death of his trustee for life. *Ashurst v. Given*, 5 Watts & S. 323. To determine who are *cestuis que trust*, see *Carson v. Carson*, 1 Wins. 24; *Noble v. Andrews*, 37 Conn. 346. The maxim "*nemo est haeres viventis*" applied. *Johnson v. Whiton*, 118 Mass. 340.

² In charitable trusts it is not necessary for the *cestui que trust* to be capable of holding a legal title; *Perry on Trusts*, Chap. XXIII. Trusts may be created for persons yet unborn; *Collins v. Hoxie*, 9 Paige, 81; *Ashurst v. Given*, 5 W. & S. 329; *Gardner v. Heyer*, 2 Paige, 11; *Carson v. Carson*, 2 Wins. (N. C.) 24; but not if immoral, or contrary to public policy; *Battlinger v. Budenbecker*, 63 Barb. 404; *Ownes v. Ownes*, 8 C. E. Green, 60; *Flint v. Steadman*, 36 Vt. 210; religious societies as *cestui que trusts*; *Bridgewater v. Waring*, 24 Pick. 304; *Rainier v. Howell*, 9 N. J. Eq. 121; *Lutheran Church v. Maschop*, 10 N. J. Eq. 57; *Presbyterian Cong. v. Johnston*, 1 Watts & S. 9; *Swedesborough Church v. Shivers*, 16 N. J. Eq. 453.

WHAT PROPERTY MAY BE MADE THE SUBJECT OF A TRUST.

As a general rule, all property, whether real or personal, and whether legal or equitable (*a*), may be made the subject of a trust, provided the policy of the law, or any statutory enactment, does not prevent the settlor from parting with the beneficial interest in favor of the intended *cestui que trust*.¹

1. Copyholds may be subject of trust, and equitable interest descends as legal. — A trust may be created of lands regulated by local custom, as copyholds. Thus, A., tenant of a manor, may surrender to the use of B. and his heirs, upon trust for C. and his heirs. And as equity follows the law, the trust in C. will devolve in the same manner as the legal estate.

2. Power to entail equitable interest depends on custom to entail legal estate. — If the custom of the manor permit an *entail* of the legal estate, an entail may in like manner be created of the equitable (*b*); but if there be no such custom as to the legal estate, there can be no entail of the equitable (*c*). Where, therefore, the equitable interest in lands held

(*a*) Knight v. Bowyer, 23 Beav. 609, see p. 635; 2 De G. & Jon. 421. [But there can be no trust of a peerage which is by its very nature a personal possession. Buckhurst Peerage, 2 App. Cas. 1.]

(*b*) Pullen v. Middleton, 9 Mod. 484; 1 Preston Conv. 152.

(*c*) The opinion of Watkins, Treat. on Cop. p. 153, and following pages, that there may be an entail of copyholds without a special custom, cannot be maintained.

¹ McCarty v. Blevins, 5 Yerg. 195; Robinson v. Mauldin, 11 Ala. 977; Clemson v. Davidson, 5 Binn. 392; Morton v. Naylor, 1 Hill, 439. Property not in existence as well as property not owned by the settlor may be the subject of a trust. Calkins v. Lockwood, 17 Conn. 154; Stewart v. Kirkland, 19 Ala. 162; Pennock v. Coe, 23 How. 117; Brooks v. Hatch, 6 Leigh, 534; Holroyd v. Marshall, 2 Giff. 382; Hinkle v. Wanzer, 17 How. 353; Bank v. Hastings, 15 Wis. 75. But see Garrow v. Davis, 15 How. 277; Gardner v. Adams, 12 Wend, 297; McKee v. Judd, 2 Ker. 622; Dunklin v. Wilkins, 5 Ala. 199; Story, Eq. Jur. §§ 1040-1055.

of a manor not permitting an entail is limited to A., and the heirs of his body, the estate is not construed as an entail but as a fee conditional;—that is, on issue born the condition is fulfilled, and A. may alienate in fee. But until alienation, the equitable interest descends in the line of the issue like an entail; and if A. die without issue, an equitable right of entry reverts to the settlor or his heir. This doctrine is attended with important consequences, which are often overlooked. Thus copyholds are devised to trustees upon trusts corresponding with the limitations of freeholds in strict settlement, and A., the first tenant for life, has a son [*48] born, but who lives only a few weeks. If *the manor do not permit an entail, the son takes a fee simple conditional, and all the subsequent limitations are void. In such a case, the copyholds should be settled like leaseholds, so as not to vest absolutely unless a child attain twenty-one, and on his death under that age to devolve on the next taker under the entail of the freeholds.

3. **Equitable interests in foreign personal property.**—How far equitable interests may be engrafted on *foreign* property requires consideration. As regards *movable* estate there is no difficulty, for it follows the person, and if the settlor himself be domiciled within the jurisdiction of the Court, all his movable estate, whether in the East or West Indies, or elsewhere, is deemed to be at home, and governed by the law of this country. A trust, therefore, may freely be created of such interests, and would be enforced in equity. In certain cases, however, there might be practical obstructions in the way of executing the trust, from the circumstance of the property lying in fact beyond the reach of the Court.

4. **Equitable interests in foreign real property.**—As to *lands* lying in a foreign country, the Court will enforce *natural equities*, and compel the specific performance of *contracts*, provided the *parties* be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree.¹

¹ *Massie v. Watts*, 6 Cranch, 160; *Watkins v. Holman*, 10 Pet. 25; *De Klyn v. Watkins*, 3 Sandf. Ch. 185; *Guild v. Guild*, 16 Ala. 121; *Sutphen v. Fowler*, 9 Paige, 280; *Vaughan v. Barclay*, 6 Whart. 392; *Church v. Wiley*, 2 Hill, Ch. 584. Where property in jurisdiction, but person not, see *Spurr v. Scoville*, 3 Cush. 578; *Meux v. Maltby*, 2 Swans. 277.

Thus Lord Eldon allowed a consignee to have a lien upon the application of general principles for proper advances upon estates in the West Indies (*a*). So the Court has enforced specific performance of articles between parties for ascertaining the boundaries of their estates abroad (*b*), has compelled a person entitled to an estate in Scotland to give effect to an equitable mortgage by deposit of deeds of the Scotch estate, though by the law of Scotland a deposit of deeds created no lien (*c*), has directed an account of the rents *and profits of lands abroad (*a*), has [*49] ordered an absolute sale (*b*), and foreclosure of a mortgage (*c*), and has relieved against a fraudulent conveyance of an estate abroad (*d*), and prevented a defendant by injunction from taking possession (*e*). In such cases, however, the Court, according to the modern doctrine, requires as a substratum for its jurisdiction that there should exist a personal privity between the plaintiff and defendant, and in the absence of such privity, no remedy lies by way of lien

(*a*) *Scott v. Nesbitt*, 14 Ves. 438.

(*b*) *Penn v. Lord Baltimore*, 1 Ves. 444, and *Belt's Suppt.*; and see *Roberdean v. Rous*, 1 Atk. 543; *Angus v. Angus*, West's Re. 23; *Tullock v. Hartley*, 1 Y. & C. Ch. Ca. 144; *Cood v. Cood*, 33 Beav. 314; *Drummond v. Drummond*, 37 L. J. N. S. Ch. 811; 17 W. R. 6.

(*c*) *Ex parte Pollard*, 3 Mont. & Ayr. 340; *reversed* Mont. & Chit. 239. But see *Norris v. Chambres*, 29 Beav. 246. *Martin v. Martin*, 2 R. & M. 507, may be supported on the ground that the mortgagee had a lien for advances and supplies. Had the lien not existed, Sir J. Leach thought the plaintiff might have compelled a sale as against the husband, but that such equity attached not to the estate, but to the person only: that after the institution of a suit, the equity would have bound the estate, but until bill filed the husband could make a good title even to a purchaser with notice; and the court instanced the case of a husband, the apparant owner of two estates of equal value, and that he made a settle-

ment of estate A. under the direction of the court, and that the trustees were afterwards evicted by defect of the husband's title: in that case the court would oblige the husband to make a settlement of estate B., but that until the bill was on the file the husband remained the owner of the estate B., and could effectually sell or charge it. As to personal equities, see further, *Morse v. Faulkner*, 1 Anst. 11, 3 Sw. 429, note (*a*); *Averall v. Wade*, Ll. & Go. temp. Sugden, 261; *Johnson v. Holdsworth*, 1 Sim. N. S. 108; *Hastie v. Hastie*, 2 Ch. D. 304.

(*a*) *Roberdean v. Rous*, 1 Atk. 543.

(*b*) *Ib.* 544.

(*c*) *Toller v. Carteret*, 2 Vern. 494; *Paget v. Ede*, 18 L. R. Eq. 118; [and see *Re Longdendale Cotton Spinning Company*, 8 Ch. D. 160.]

(*d*) *Arglasse v. Muschamp*, 1 Vern. 75.

(*e*) *Cranstown v. Johnston*, 5 Ves. 278; and see *Bunbury v. Bunbury*, 1 Beav. 318; *Hope v. Carnegie*, 1 L. R. Ch. App. 320.

against the land itself (*f*). Parties out of the jurisdiction may now be served abroad, but this does not extend the jurisdiction of the Court in respect of relief (*g*).

5. While the Court will, to this extent, administer *equities*, and enforce *contracts* as to lands abroad, so far as the Court, by acting upon the parties, can give effect to the decree, there are cases where the foreign law presents an insuperable obstacle to the execution of the decree, and then the Court will not make a decree which would be nugatory (*h*).

6. **Trusts of lands abroad.** — The better opinion is that *trusts*,¹ not constructively such, like natural equities or equi-

(*f*) *Norris v. Chambres*, 29 Beav. 246; 3 De G. F. & J. 583; [and see *Re Hawthorne*, 23 Ch. D. 743.]

(*g*) *Cookney v. Anderson*, 31 Beav. 452. In this case the court said that to found the jurisdiction either the persons against whom the relief was sought must be within the jurisdiction, or the subject matter in dispute must be within those limits, or the contract must have been entered into or intended to be performed within the same limits; *ib*. And see *Maunder v. Lloyd*,

2 J. & H. 718; *Edwards v. Warden*, 9 L. R. Ch. App. 495; [and see the rules of the Supreme Court, 1883, Order xi. R. 1.]

(*h*) *Waterhouse v. Stansfield*, 9 Hare, 234; 10 Hare, 254; *Carteret v. Petty*, 2 Swans. 323, note (a), and 2 Ch. Ca. 214, the case not of a *contract* as in *Penn v. Lord Baltimore*, but of a *partition* which the court had no means of carrying into effect; and see *Norris v. Chambres*, 29 Beav. 246.

¹ Where a trust is created by will, the residence of the trustee and *cestui que trust* out of the state will not remove the control of it from the court; *Chase v. Chase*, 2 Allen, 101; *Curtis v. Smith*, 60 Barb. 9; a trustee appointed by a court can sue only within its jurisdiction, but a trustee named by a settlor may sue in any court having jurisdiction over the parties or property; *Curtis v. Smith*, 6 Blatch. 537; a court may make a decree *in personam* if the parties are present; *Mead v. Merritt*, 2 Paige, 404; *White v. White*, 7 Gill & J. 208; and it is enough if the person against whom the decree is made is found and served within the jurisdiction; *Woodward v. Schatzell*, 3 Johns. Ch. 412; *Mitchell v. Bunch*, 2 Paige, 606; *Chalmers v. Hack*, 19 Me. 124; if neither person or property is within the jurisdiction of the court, no action will be taken; *Booth v. Clark*, 17 How. 322; *Bank v. Adams*, 1 Pars. Eq. 547; *Hawley v. James*, 7 Paige, 213; *Walker v. Ogden*, 1 Dana, 252; courts having jurisdiction over the parties may by injunction prevent their proceeding elsewhere, and hold them for contempt if they ignore it; *Dehon v. Foster*, 4 Allen, 545; *Beal v. Burchstead*, 10 Cush. 523; *Moody v. Gay*, 15 Gray, 457; *Bank v. Rutland*, 28 Vt. 470; *Cage v. Cassidy*, 23 How. 109; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 470; *Pearce v. Olney*, 20 Conn. 644; *Story, Eq. Jur.* §§ 899, 900; *Briggs v. French*, 1 Sumn. 504; but where courts of different states have concurrent jurisdiction, the parties may exercise their choice; *M'Kim v. Voorhies*, 7 Cranch, 279; *English v. Miller*, 2 Rich. Eq. 320; *Coster v. Griswold*, 4 Edw. Ch. 377; *Craft v. Lathrop*, 2 Wall. Jr. 103; *Bicknell v. Field*, 8 Paige, 440; *Vail v. Knapp*, 49 Barb. 290.

ties arising from contract, but properly such, and formerly known as *uses*, cannot be engrafted upon foreign real estate. The law regulating lands in England has a *local* character. How then can a system adapted exclusively to lands in England be transplanted and attached to lands abroad? Could entails, for instance, be created where none are allowed, and if created, by what machinery could they be barred? It has been seen that in the case of copyholds, when the custom * of the manor does not allow entails of the [*50] legal estate, none can be created of the equitable, and the same principle will apply to trusts of foreign lands. The few authorities upon the subject tend to confirm this view, but there is little light to be obtained from them, and the law must be regarded as still somewhat unsettled (a).

(a) *Glover v. Strothoff*, 2 B. C. C. 33; *Nelson v. Bridport*, 8 Beav. 547; see 570; *Martin v. Martin*, 2 R. & M. 507; (in which case it did not occur either to the bar or the bench that the legal estate could be held upon the trusts of the settlement without the intervention of a sale;) *Godfray v. Godfray*, 12 Jur. N. S. 397.

OF THE FORMALITIES REQUIRED FOR THE CREATION OF TRUSTS.

UPON this subject we propose to treat — First, Of Declarations of Trust at common law. Secondly, Of the Statute of Frauds. Thirdly, Of the Statutes of Wills.

SECTION I.

OF TRUSTS AT COMMON LAW.

1. **Trusts averrable.** — Trusts, like uses, are of their own nature *averrable*, i.e., may be declared by word of mouth without writing (*a*); as, if before the Statute of Frauds an estate had been conveyed unto and to the use of A. and his heirs, a trust might have been raised by parol in favour of B. (*b*), and since the statute, though a trust of lands cannot be declared by parol without proof of it in writing, no other proof is requisite than a simple note in writing duly signed, but not under seal (*c*).¹

2. **Averment must not contradict the instrument.** — But the Court, following the analogy of uses, never permitted the averment of a trust in contradiction to any expression of intention on the face of the instrument itself (*d*).

(*a*) See *Fordyce v. Willis*, 3 B. C. C. 587; *Benbow v. Townsend*, 1 M. & K. 506; *Bayley v. Boulcott*, 4 Russ. 347; *Crabb v. Crabb*, 1 M. & K. 511; *Kilpin v. Kilpin*, Id. 520.

(*b*) See *Bellasis v. Compton*, 2 Vern. 294; *Fordyce v. Willis*, 3 B. C. C. 587; *Thurxton v. Attorney-General*, 1 Vern. 341.

(*c*) *Adlington v. Cann*, 3 Atk. 151, *per* Lord Hardwicke; *Boson v. Stat-ham*, 1 Eden. 513, *per* Lord Keeper Henley.

(*d*) *Lewis v. Lewis*, 2 Ch. Rep. 77; *Finch's case*, 4 Inst. 86; *Fordyce v. Willis*, 3 B. C. C. 587; see *Childers v. Childers*, 3 K. & J. 310; 1 De G. & J. 482.

¹ This question has only a theoretical value in America, as the Statute of Frauds has been very generally adopted; see the statutes of the various states.

3. **Nor be repugnant to the scope of the instrument.**—And averment is excluded, if from *the nature of the instrument* or *any circumstance of evidence* appearing on the face of it, an intention of making the legal holder the beneficiary also, can be clearly implied. Thus a trust cannot be averred, where a *valuable * consideration* is paid (*a*); and if a [*52] *pension* from the Crown be granted to A., a trust cannot be raised by parol in favour of B.; for a pension is conferred upon motives of honour, and the inducements to the bounty are the personal merits of the annuitant (*b*).

4. **Trusts not averrable where deed required to pass the legal estate.**—It was a principle of uses that, on a *feoffment*, which could be made by parol, a use might be declared by parol, but where a *deed* was necessary for passing the legal estate, there the use which was engrafted could not be raised by averment (*c*).¹ As trusts have been modelled after the likeness of the use (*d*), the distinction at the present day may deserve attention. It is laid down by Duke expressly, that, where the things given may pass *without deed* there a charitable use may be averred by witnesses; but, where the things *cannot pass without deed*, there charitable uses cannot be averred without a deed proving the use (*e*). And Lord Thurlow, it is probable, alluded to the same distinction when he observed, “I have been accustomed to consider uses as averrable, but perhaps; when looked into, the cases may relate to *feoffment*, not to conveyances by bargain and sale, or lease and release” (*f*). And in *Adlington v. Cann* (*g*), where a testator devised the legal estate in lands to A. and

(a) See Gilb. on Uses, 51, 57; Pilkington v. Bayley, 7 B. P. C. 526.

(b) Fordyce v. Willis, 3 B. C. C. 587.

(c) Gilb. on Uses, 270.

(d) See Fordyce v. Willis, 3 B. C. C. 587; Lloyd v. Spillet, 2 Atk. 150; Attorney-General v. Lockley, Append. to Vend. & Purch. No. 16, 11th ed.; Chaplin v. Chaplin, 3 P. W. 234;

Attorney-General v. Scott, Cas. t. Talb. 139; Burgess v. Wheate, 1 Eden. 195, 217, 248; Geary v. Bearcroft, Sir O. Bridg. 488.

(e) Duke, 141.

(f) Fordyce v. Willis, 3 B. C. C. 587.

(g) 3 Atk. 141.

¹ Simms v. Smith, 11 Ga. 198; Lloyd v. Inglis, 1 Des. 333; Steere v. Steere, 5 Johns. Ch. 1; 9 Am. Dec. 256; Dean v. Dean, 6 Conn. 285; Philbrook v. Delano, 29 Me. 410; Squires's App. 70 Pa. St. 266; Hutchinson v. Tindall, 2 Green. Ch. 257; Strong v. Glasgow, 2 Murph. 289; Leman v. Whitley, 4 Russ. 423; Harris v. Barnett, 3 Gratt. 339.

B. and their heirs by a will duly executed, and left an unattested paper referring to trusts for a charity, Mr. Wilbraham in the argument observed, "If this were a voluntary *deed*, would a *paper*, even declaring a trust, be sufficient to take it from the grantee? no, certainly" (*h*); and it is very observable that Lord Hardwicke, in referring to this observation, excludes the case of a *deed*, and lays it down that "if the testator had made a *feoffment* to himself and his heirs, and left such a *paper*, this would have been a good declaration of trust" (*i*).

5. *Declaration of trust by the king.* — The declaration of a *use* by the *king* must have been by letters patent (*k*); and it seems that the same doctrine is now applicable to trusts (*l*).

[*53]

* SECTION II.

OF THE STATUTE OF FRAUDS.

By the seventh section of the Statute of Frauds (*a*) it is enacted, that "all declarations or creations of trusts or confidences of any *lands, tenements, or hereditaments*, shall be *manifested and proved* by some *writing, signed* by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Upon the subject of this enactment we shall first briefly point out what interests are within the Act; and, secondly, what formalities are required by it.

I. *Of the interests within the Act.*

1. *Copyholds.* — *Copyholds* are to be deemed within the operation of the clause, for as a trust is engrafted on the estate of the *copyhold* tenant, the rights of the lord, who claims by title paramount, cannot in any way be injuriously affected, and therefore the ordinary ground for exempting copyholds from statutory enactments does not exist (*b*). A

(*h*) Ib. 145.(*i*) Ib. 151.(*k*) Bacon on Uses, 66.(*l*) *Fordyce v. Willis*, 3 B. C. C. 577.(*a*) 29 Car. 2. c. 3.

(*b*) See *Withers v. Withers*, Amb. 151; *Goodright v. Hodges*, 1 Watk. on Cop. 227; S. C. Lofft. 230; *Acherley v. Acherley*, 7 B. P. C. 273; but see *Devenish v. Baines*, Pr. Ch. 5.

trust, therefore, of a copyhold cannot be declared by *parol* so as to make the copyholder a trustee for another (c).

2. **Chattels real within the Act.** — *Chattels real* are within the purview of the Act, and a trust of them must therefore be evidenced by writing, as in the case of freeholds (d).

3. **Chattels personal not within the Act.** — But *chattels personal* are not within the Act, and a trust by averment will be supported (e).¹ It has even been held that a *sum of money secured upon a mortgage of real es- [*54] tate is not an interest within the Act, and that a *parol* declaration is good (a). And if a trust be once created by

(c) Mr. Hargrave seems to have thought, that even the *uses of a surrender* were *trusts* within the intention of the Act; for, in a note to Coke on Littleton, he observes, "A nuncupative will of copyholds was a valid declaration of the uses, where the surrender was silent as to the form, till the 29 Car. 2. required all declarations of trust to be in writing." But the surrender of a copyhold to uses is merely a direction to the lord in what manner to regrant the estate, and the surrenderee is a *cestui que use* by misnomer only, and not in fact; and indeed the Court of Queen's Bench has expressly decided that uses of copyholds are not within the Statute of Frauds, on the ground that a surrender to uses is not the creation of a trust or confidence apart from the legal estate, but a mode established by custom of transferring the legal estate itself. *Doe v. Danvers*, 7 East, 299.

(d) *Skett v. Whitmore*, Freem. 280; *Forster v. Hale*, 3 Ves. 696; *Riddle v. Emerson*, 1 Vern. 108; and see

Hutchins v. Lee, 1 Atk. 447; *Bellasis v. Compton*, 2 Vern. 294.

(e) *Bayley v. Boulcott*, 4 Russ. 347, per Sir J. Leach; *M'Fadden v. Jenkins*, 1 Hare, 461, per Sir J. Wigram; S. C. 1 Ph. 167, per Lord Lyndhurst; *Grant v. Grant*, 34 Beav. 623; *Thorpe v. Owen*, 5 Beav. 224; *George v. Bank of England*, 7 Price, 646; *Hawkins v. Gardiner*, 2 Sm. & G. 451, per V. C. Stuart; *Peckham v. Taylor*, 31 Beav. 250; *Fordyce v. Willis*, 3 B. C. C. 587, per Lord Thurlow; *Benbow v. Townsend*, 1 M. & K. 510, per Sir J. Leach; *Fane v. Fane*, 1 Vern. 31, per Lord Nottingham; *Nab v. Nab*, 10 Mod. 404. (But this case, as reported 1 Eq. Ca. Ab. 404, appears an authority the other way.) The dictum of Lord Cranworth in *Scales v. Maude*, 6 De G. M. & G. 43, that a trust could not be declared by *parol* in favor of a volunteer was afterwards disclaimed by him. *Jones v. Lock*, 1 L. R. Ch. App. 28.

(a) *Benbow v. Townsend*, 1 M. & K. 506; and see *Bellasis v. Compton*, 2 Vern. 294.

¹ *Thacher v. Churchill*, 118 Mass. 108; *Davis v. Coburn*, 128 Mass. 377; *Chace v. Chapin*, 130 Mass. 128; *Maffitt v. Rynd*, 69 Pa. St. 380; *Porter v. Bank*, 19 Vt. 410; *Crissman v. Crissman*, 23 Mich. 218; *Robson v. Harwell*, 6 Ga. 589; *Kimball v. Morton*, 1 Halst. Ch. 26; 43 Am. Dec. 621. A *parol* declaration is sufficient to raise a trust in a mortgage secured by real estate. *Childs v. Jordan*, 106 Mass. 322; *Patterson v. Mills*, 69 Ia. 755; *Hackney v. Vrooman*, 62 Barb. 650. Likewise in money received from the sale of real estate. *Maffitt v. Rynd*, 69 Pa. St. 380; *Coburn v. Anderson*, 131 Mass. 513.

parol declaration, it cannot be affected by any subsequent parol declaration of the settlor to the contrary (*b*). But the approval of a draft declaration of trust, subject to further consideration as to one of the provisions of it, will not amount to a parol declaration (*c*). If a settlor direct a sum to be invested in the names of the trustees of her marriage settlement, the Court considers this as tantamount to a parol declaration, or rather the presumption is, that the sum so invested should be held upon the same trusts as the settled funds (*d*).

4. *Case of fraud.*—The Statute of Frauds cannot be pleaded by a defendant to whom the estate has been conveyed without consideration, and who claims to retain it under circumstances which the Court deems *fraudulent* (*e*).¹

(*b*) *Kilpin v. Kilpin*, 1 M. & K. 520, see 529; *Crabb v. Crabb*, 1 M. & K. 511.

(*c*) *Re Syke's Trusts*, 2 J. & H. 415.

(*d*) *Re Curteis' Trust*, 14 L. R. Eq. 217.

(*e*) *Davies v. Otty* (No. 2), 35 Beav. 208; *Haigh v. Kaye*, 7 L. R. Ch. App. 469; *Childers v. Childers*,

1 De G. & J. 482; *Lincoln v. Wright*, 4 De G. & J. 16; [*Booth v. Turle*, 16

L. R. Eq. 182.]

¹ The statute is intended to prevent, and not to facilitate fraud. *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535; *Morrill v. Cooper*, 65 Barb. 519; *Levy v. Brush*, 45 N. Y. 589; *Bitter v. Jones*, 28 Hun, 494. Where a party attempted to hold property taken as collateral, the court said it was "too gross a fraud to be permitted." *Carr v. Carr*, 52 N. Y. 259. Equity will aid in defeating fraud, regardless of the statute. *Robbins v. Robbins*, 89 N. Y. 257; *Wood v. Rabe*, 96 N. Y. 427. "The rule in equity always has been that the statute is not allowed as a protection of fraud, or as a means of seducing the unwary into false confidence, whereby their intentions are thwarted or their interests betrayed," is the language of the court in *Jenkins v. Eldredge*, 3 Story, 290; but no invariable rule has been, or can be established. *Hill on Trustees*, 224; *Perry on Trusts*, § 169; *Harding v. Wheaton*, 2 Mass. 389. For a further discussion of the question, see *Bonham v. Craig*, 80 N. C. 224; *Newton v. Taylor*, 32 Ohio St. 399; *Rasdall v. Rasdall*, 9 Wis. 379; *Fouty v. Fouty*, 34 Ind. 433. An unconscientious refusal to perform an alleged promise to recovery is not such fraud as will displace the statute. *Johnston v. La Motte*, 6 Rich. Eq. 347. Only clear and simple trusts for the benefit of a debtor are liable to execution of the statute. *Rice v. Burett*, 1 Spear's Eq. 579; 42 Am. Dec. 336. Statute of Frauds does not apply to trusts of personality. *Kimball v. Morton*, 1 Halst. Ch. 26; 43 Am. Dec. 621; *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 54; *Towles v. Burton*, Rich. Eq. Cas. 146; 24 Am. Dec. 409; *Robson v. Harwell*, 6 Ga. 589. If a deed is absolute in form, its purpose cannot be shown by parol. *Lawson v. Lawson*, 117 Ill. 98. An express trust must be manifested or proved in writing. *Donlin v. Bradley*, 119 Ill. 412. Neither does the statute apply where the subject of the trust is a debt, and not the land mortgaged to secure it. *Patterson v.*

5. **Charitable uses within the Act.**—An attempt was formerly made to have a *charitable use* excepted from the statute, but Lord Talbot decreed (*f*), and Lord Hardwicke affirmed the decision (*g*), and Lord Northington said every man of sense must subscribe to it (*h*), that a gift to a charity must be treated on the same footing with any other disposition.

6. **Whether the Crown is bound by the statute.**—It was held by the Court of Queen's Bench (*i*), that the *Crown* was bound by the Statute of Frauds, and therefore was not at liberty to prove a *superstitious use* by parol; but in the Court of *Exchequer* it was ruled, on the contrary, that the Statute of Frauds did *not* bind the Crown, but took place only between subject and *subject. Lord Hardwicke [*55] expressed his doubts upon the latter doctrine, that the Crown was not bound by a statute unless specially named; but at the same time mentioned a case in which that doctrine had been followed (*a*).

7. **Colonial lands.**—It seems the statute will not apply to lands situate in a *colony* planted before the Statute of Frauds was passed (*b*). Planters carry out with them their country's laws as they subsist at the time; but subsequent enactments at home do not follow them across the seas unless it be so specially provided.

[8. **The statute to be a bar must be pleaded.**—If an action be brought to have the benefit of a parol trust of lands, a defendant, who would rely on the Statute of Frauds as a bar, must under the present practice insist upon it by his pleading (*c*)].¹

(*f*) *Lloyd v. Spillet*, 3 P. W. 344. and see *Adlington v. Cann*, 3 Atk.

(*g*) S. C. 2 Atk. 148; S. C. Barn. 146.

384; and see *Adlington v. Cann*, 3 Atk. 150.

(*a*) *Adlington v. Cann*, 3 Atk. 154.

(*b*) See 2 P. W. 75; *Gardiner v.*

(*h*) *Boson v. Statham*, 1 Eden. 513. Fell, 1 J. & W. 22.

(*i*) *King v. Portington*, 1 Salk. 162; [(*c*) Rules of the Supreme Court

Mills. 69 Ia. 755. Trusts may be declared by letter. *Moore v. Pickett*, 62 Ill. 158. Parol admissions require, also, evidence of an agreement before the sale. *Barnes v. Taylor*, 27 N. J. Eq. 250. Absolute deed with instructions to sell after grantor's death, and pay legacies, is void. *Adams v. Adams*, 79 Ill. 517. See, also, notes relating to parol evidence.

¹ The Statute of Frauds is waived if not pleaded; *Carpenter v. Davis*, 72

II. *What formalities are required by the statute.*

1. **Trusts to be proved by, not declared in, writing.**—The principal point to be noticed is, that trusts, as already observed, are not necessarily to be *declared* in writing, but only to be *manifested and proved by* writing; for if there be written evidence of the existence of such a trust, the danger of parol declarations, against which the statute was directed, is effectually removed (*d*). It may be questioned whether

Order XIX, R. 15. As to the former practice see the 7th Edition of this Treatise, p. 51.] (*d*) *Forster v. Hale*, 3 Ves. 707, *per* Lord Alvanley; S. C. 5 Ves. 316, *per* Lord Loughborough; *Smith v. Matthews*, 3 De G. F. & J. 139.

III. 14. A bill may be open to demurrer, if it shows on the face of it that the Statute of Limitations, the Statute of Frauds, or any other Statute, either bars the right or the remedy of the plaintiff in equity. If the allegations of a bill to enforce an express trust concerning lands clearly imply that the declaration of trust was not in writing, the objection may be taken by demurrer. *Campbell v. Brown*, 129 Mass. 23; *Ahrend v. Odiorne*, 118 Mass. 261, 268; *Slack v. Black*, 109 Mass. 496; *Walker v. Locke*, 5 Cush. 90; *Randall v. Howard*, 2 Black, 585; *Farnham v. Clements*, 51 Me. 426; 1 Dan. Ch. Pr. 5th Eng. ed. 480, note. It appears to have been at times doubted whether the Statute of Limitations could be set up by way of demurrer, or whether the objection must not be taken by plea. But it is now clearly and conclusively settled, that an objection arising out of *any statute* is as much matter of demurrer as any other matter of law. So that, if on the facts alleged by the bill it appears that an existing statute bars the plaintiff either of his right or of his remedy, the objection may be taken by demurrer as well as by plea. But if the bill does not show affirmatively that the case is not within the statute, such offence must be specially pleaded, and cannot be taken by demurrer. *Beckwith v. Young*, 4 Drew. 1, 3; *Wood v. Midgley*, 5 De G. M. & G. 41; *Heys v. Astley*, 4 De G. J. & S. 34; see *Catling v. King*, 5 Ch. Div. 660; *Futcher v. Futcher*, 50 L. J. Ch. 735, *per* Fry, J; *Pullen v. Snelus*, 48 L. J. C. P. 394.

“Before the passing of the Judicature Acts there was a difference between the practice at law and the practice in equity, in cases like the present. At law, if the contract was denied, it was a matter of evidence whether the contract were one which could be sued upon, or whether the remedy was barred by the statute. But in equity, if the defendant intended to rely upon the Statute of Frauds or any other special statute, he was compelled to make a specific averment of his intention.” *Mellish*, L. J. in *Clarke v. Callow*, 46 L. J. Q. B. at p. 54, C. A., and in *Catling v. King*, 5 Ch. Div. at p. 662.

In a recent case in the House of Lords it was declared that there is a distinction between the Statute of Limitations and the Statute of Frauds. The latter must be pleaded. The title to the estate, not the mere right to proceed for its recovery, is affected by the former. If the plaintiff's statement of claim shows, on the face of it, that the time within which a title to land must be asserted has gone by, the defence of the Statute of Limitations may be raised on demurrer. And a defence so used is sufficient without any distinct reference to the statute. *Dawkins v. Penrhyn*, 4 App. Cas. 51. On this case Lord

the Act did not intend that the *declaration itself* should be in writing; for the ninth section enacts, that "all grants and assignments of any trust or confidence shall *likewise be in writing*, signed by the party granting or assigning the same, or by such last will or devise (*e*);" but whatever may have been the actual intention of the legislature, the construction put upon the clause in practice is now firmly established.¹

(*e*) *i.e.* A will executed in conformity with section 5. Note that *Crooke v. Brooking*, 2 Vern. 50, 106, was before the Statute of Frauds.

Cairns observed that "the law always has been, and the law continues to be, that in addition to a specified ground of demurrer you may, at the bar, allege any other ground of demurrer which appears upon the face of the bill."

¹ *Proof*: If trusts are manifested and proved in writing, it is sufficient. *Black v. Black*, 4 Pick. 236; *Gibson v. Foote*, 40 Mass. 788; *Gerry v. Stimson*, 60 Me. 186; *Pinney v. Fellows*, 15 Vt. 525. In many of the states the trust must be created or declared by an instrument in writing signed by the party, but these words apparently are construed as synonymous with those of the English statute. *Jenkins v. Eldredge*, 8 Story, 294; *Cook v. Barr*, 44 N. Y. 158; *Corse v. Leggett*, 25 Barb. 394; *Pinnock v. Clough*, 16 Vt. 500; *White v. Douglass*, 3 Seld. 568; *Pratt v. Ayer*, 3 Chand. 265; *Sheet's Est.* 52 Pa. St. 257; *Blodgett v. Hildreth*, 103 Mass. 486; *Browne*, St. Frauds, § 104. *Parol*: Trusts may be created, but not proved by parol. *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *Groves' Heirs v. Fulsome*, 16 Mo. 543; 57 Am. Dec. 247; *Cornell v. Utica R. R. Co.* 61 How. Pr. 192. Trusts are not within the statute. *Johnson v. Habbell*, 2 Stock. Ch. 332; *Rice v. Burnett*, 1 Spear's Eq. 579; 42 Am. Dec. 336. The grantor is estopped from denying that a consideration was paid, by the ordinary clause in a deed acknowledging the receipt of the consideration, and parol evidence on the point is inadmissible, but it may be allowed to vary, explain, or contradict the amount of consideration. 2 Dev. Deeds, § 836; *Twomey v. Crowley*, 137 Mass. 184; *Aull v. Aull*, 80 Mo. 199; *Rhine v. Ellen*, 36 Cal. 362; *Belden v. Seymour*, 8 Conn. 304; 21 Am. Dec. 661; *Goodspeed v. Fuller*, 46 Me. 141; *M'Crea v. Purmort*, 16 Wend. 460. In absence of fraud, accident, or mistake, the grantor in an absolute deed, with valuable consideration, and that acknowledged, is precluded from showing that the grantee was to hold in trust for him. *Trafton v. Hawes*, 102 Mass. 533; *Russ v. Mebius*, 16 Cal. 350; *Beers v. Beers*, 22 Mich. 42; *Farrington v. Barr*, 36 N. H. 86; *Stackpole v. Robbins*, 47 Barb. 212; *McConnell v. Brayner*, 63 Mo. 461; *Lawson v. Lawson*, 117 Ill. 98. Parol is admissible to show that an apparently absolute deed is a mortgage; *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481; *Fowler v. Stoneum*, 11 Tex. 478; 62 Am. Dec. 490; *Hall v. Seville*, 3 G. Greene, 37; 54 Am. Dec. 485; but it must be clear and conclusive; *Corbit v. Smith*, 7 Ia. 60; 71 Am. Dec. 431; as must parol evidence of a trust always. *Snelling v. Utterback*, 1 Bibb. 609; *Hunter v. Bilyen*, 30 Ill. 246; *Brady v. Parker*, 4 Ired. Eq. 430; *Philpot v. Ellicott*, 4 Md. Ch. 273; *Harper v. Patterson*, 14 C. P. 538; *McNabb v. Nicholl*, 3 L. J. N. S. 21; *Fleming v. Duncan*, 17 Chy. 76; *Shaw v. Shaw*, 17 Chy. 282; *Wilde v. Wilde*, 20 Chy. 521; *McManus v. McManus*, 24 Chy. 118; *Gamble v. Lee*, 25 Chy. 326; *Hutchinson v. Hutchinson*, 6 Chy. 117; *Curry v. Curry*, 26 Chy. 1; *Parsons v. Kendall*, 6 Chy. 408; *Denny v. Lithgow*, 16 Chy. 619; *Ross v. Ross*,

2. *As by a letter, recital, &c.*—The statute will be satisfied, if the trust can be manifested and proved by any subsequent acknowledgment by the trustee, as by an express declaration by him (*f*), or any memorandum to that effect (*g*), or by a letter under his hand (*h*), by his [*56] answer in **Chancery* (*a*), or by an affidavit (*b*), or by a recital in a bond (*c*), or deed (*d*), &c.; and the

(*f*) *Ambrose v. Ambrose*, 1 P. W. 321; *Crop v. Norton*, 9 Mod. 233.

(*g*) *Bellamy v. Burrow*, Cas. t. Talb. 98; and see *Re Bennett's Settlement Trusts*, 17 L. T. N. S. 438; 16 W. R. 331.

(*h*) *Forster v. Hale*, 3 Ves. 696; S. C. 5 Ves. 308; *Morton v. Tewart*, 2 Y. & C. Ch. Ca. 67; *Bentley v. Mackay*, 15 Beav. 12; *Childers v. Childers*, 1 De G. & J. 482; *Smith v. Wilkinson*, cited 3 Ves. 705; *O'Hara v. O'Neill*, 7 B. P. C. 227; and see *Gardner v. Rowe*, 2 S. & S. 354.

(*a*) *Hampton v. Spencer*, 2 Vern. 288; *Nab v. Nab*, 10 Mod. 404; *Cottingham v. Fletcher*, 2 Atk. 155; *Ryall v. Ryall*, 1 Atk. 59, *per* Lord Hardwicke; *Wilson v. Dent*, 3 Sim. 385. A bill differed from an answer, as it was not signed by the party. See, however, *Butler v. Portarlington*, 1 Conn. & Laws. 1.

(*b*) *Barkworth v. Young*, 4 Drew. 1.

(*c*) *Moorcroft v. Dowding*, 2 P. W. 314.

(*d*) *Deg v. Deg*, 2 P. W. 412.

16 Chy. 642; *Brown v. Copron*, 24 Chy. 91. The testimony of a single witness has been held insufficient. *Miller v. Thatcher*, 9 Tex. 482; 60 Am. Dec. 172; *Johnson v. Deloney*, 35 Tex. 48. For the distinction between an unconditional deed of trust and one in the nature of a mortgage, see *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637; determined by the intention of the parties, *Reece v. Allen*, 5 Gilm. 236; 48 Am. Dec. 336. Parol is admissible to show the purpose of an instrument. *Morris v. Budlong*, 78 N. Y. 553. One holding security for debt is only a mortgagee. *Beatty v. Brummett*, 94 Ind. 79. It may be shown that a deed of trust is fraudulent. *Ashley v. Robinson*, 29 Ala. 112; 65 Am. Dec. 387. In Minnesota trusts by parol are very strictly barred by statute, but if partly executed the court will decree specific performance. *Wentworth v. Wentworth*, 2 Minn. 277; 72 Am. Dec. 97; *Catlin v. Fletcher*, 9 Minn. 88. In the province of Ontario any subsequent acknowledgment in writing, declaring the trust, will be sufficient, and it will relate back to the creation of the trust. *Harper v. Patterson*, 14 C. P. 538. Bill did not allege any writing evidencing the trust, but was taken *pro confesso*; as the facts were not denied, the defendant was declared a trustee. *McNabb v. Nicholl*, 3 L. J. N. S. 21. An attorney took a conveyance in trust for a client, but did not sign any writing as to it; afterwards he made an oral agreement to accept the property in payment of two notes, which was binding on him. *Fleming v. Duncan*, 17 Chy. 76. Trust might be shown by parol where the Statute of Frauds was not set up in the answer. *Shaw v. Shaw*, 17 Chy. 282. Trust agreement may be shown by parol. *Williams v. Jenkins*, 18 Chy. 536. Statute may set up, though not specially pleaded. *Wilde v. Wilde*, 20 Chy. 521. Notwithstanding the statute, the plaintiff could enforce an agreement to attend a sale, and as an agent, buy for him. *Ross v. Scott*, 22 Chy. 29; see *McManus v. McManus*, 24 Chy. 118.

trust, however late the proof, operates retrospectively from the time of its creation. Even where a lease was granted to A., who afterwards became bankrupt, and *then* executed a declaration of trust in favour of B., a jury having found upon an issue directed from Chancery that A.'s name was *bond fide* used in the lease in trust for B., it was held that the assignees of A. had no title to the property (e).¹

(e) *Gardner v. Rowe*, 2 S. & S. see *Plymouth v. Hickman*, 2 Vern. 346; S. C. affirmed, 5 Russ. 258; and 167.

¹ *Creation of trusts*: No particular formality is required to establish an express trust. *Seymore v. Freer*, 8 Wall. 202; *Price v. Minot*, 107 Mass. 61; *Price v. Reeves*, 38 Cal. 457; *Pownal v. Taylor*, 10 Leigh. 183; *Currie v. White*, 45 N. Y. 822; *Reed v. Lukens*, 44 Pa. St. 200; *Paul v. Fulton*, 25 Mo. 156; *Jones v. Wilson*, 60 Ala. 332; *Conway v. Cutting*, 51 N. H. 408; *Ogden v. Larrabee*, 57 Ill. 389; *McClellan v. McClellan*, 65 Me. 500; *Norman v. Burnett*, 25 Miss. 183; *Brown v. Combs*, 29 N. J. (Law) 36; *Chamberlain v. Thompson*, 10 Conn. 243. A memorandum is sufficient. *Urann v. Coates*, 109 Mass. 581; but see *Homer v. Homer*, 107 Mass. 82. A letter affidavit deposition or answer to a bill in equity is sufficient. *Phillips v. So. Park Comm'ss*, 119 Ill. 626; *Moore v. Pickett*, 62 Ill. 158; *Montague v. Hayes*, 10 Gray, 609; *Barkworth v. Young*, 4 Drew. 1; *Phelps v. Seely*, 22 Gratt. 573; *Maccubbin v. Cromwell*, 7 Gill. & J. 175; *McLaurie v. Partlow*, 53 Ill. 340. Acknowledgments in letters may be sufficient. *Dyer's App.* 107 Pa. St. 446; see *Preston v. Casner*, 104 Ill. 262. Mere words of suggestion are sufficient. *Wood v. Seward*, 4 Redf. 271; *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572. "In trust for B., wife of C., and her heirs and assigns forever" is a trust for her during coverture and a legal estate only afterwards. *Moore v. Stinson*, 144 Mass. 694; *Richardson v. Stodder*, 100 Mass. 528; *Ayer v. Ayer*, 16 Pick. 327. To give property to one for the support of another is sufficient to show that a trust was intended. *Loring v. Loring*, 100 Mass. 340; *Andrews v. Cape Ann Bank*, 3 Allen, 313; *Whiting v. Whiting*, 4 Gray, 236. Facts must be disclosed showing a fiduciary relation between the parties, as well as the terms of the trust. *Tatge v. Tatge*, 34 Minn. 272. The owner of land, having mortgaged it, conveyed to the mortgagee in consideration of a promise to pay him any surplus received, at the end of three years, and a trust was created when the mortgagee sold at an increase. *Freer v. Lake*, 115 Ill. 662. A. conveyed to B., who executed a writing that he purchased for C., thereby raising a trust through C., gave no consideration and made a fraudulent sale to D. *Titchenell v. Jackson*, 26 W. Va. 460. A declaration in buying that grantee was securing a one-half interest for A., sufficient. *McCandless v. Warner*, 26 W. Va. 754. It is not enough to say that "he was going to buy the land for his son." *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Rep. 137. Neither is a written acknowledgment by one party that another is entitled to certain property, without consideration for such acknowledgment. *Thompson v. Branch*, Meigs, 390; 33 Am. Dec. 153. A. paid for land which, by fraud, he conveyed to another, and he could claim a trust for himself, but his heirs could not. *Cooper v. Cockrum*, 87 Ind. 443. A voluntary agreement, without consideration, will not be enforced if the settlor intended some other act. *Lloyd v. Brooks*, 34 Md. 27; *Swan v. Frick*, 34 Md. 139. There must be an

3. Relation to subject-matter, and nature of trust must be clear.—But with regard to letters and loose acknowledg-

equitable interest which the court will recognize. *Lawson v. Lawson*, 117 Ill. 98; *Jones v. Lloyd*, 117 Ill. 597. Defendant purchasing property with money of plaintiff held it in trust for him. *Arnold v. Robins*, 40 N. J. Eq. 723. A party getting title to land wrongfully, whether in good faith or not, is a trustee for the equitable owner. *Lakin v. Mining Co.* 25 Fed. Rep. 337. A trust is created when it "is fully expressed and clearly defined upon the face of the instrument creating it." *Loring v. Palmer*, 118 U. S. 321; *Mich. Sts. § 5573*. A. buys land in his own name, and B. afterwards pays for it, but no trust results. *Williams v. San Saba Co.* 59 Tex. 442. A trust is frequently inferred from the facts in the case. *Chadwick v. Chadwick*, 59 Mich. 87. There is no trust relation between an insurance company or its officers and its policy holders to support an equitable action. *Hencken v. U. S. Life Ins. Co.* 11 Daly (N. Y.) 282. An agreement without consideration to execute a trust in future is not binding, but where such a trust has been actually undertaken equity will enforce it. *Switzer v. Skiles*, 3 Gilm. 529; 44 Am. Dec. 723. Husband and wife making a conveyance, the proceeds to pay his debts, raises a trust. *Barnes v. Trafton*, 80 Va. 524. A. held shares of stock in trust for B. A. sold them to C., who held them subject to the trust. *Perkins v. Perkins*, 134 Mass. 441. Where personal is absolutely conveyed, the declarations of the transferer and assent of transferee may create a trust. *Chace v. Chapin*, 130 Mass. 128. Wife, giving in trust for her insolvent husband, remainder over, created a trust, barring his creditors. *Cummings v. Corey*, 58 Mich. 494. It is held that a voluntary trust without consideration is good. *Van Cott v. Prentice*, 104 N. Y. 45; but see *Lane v. Ewing*, 31 Mo. 75. Conveyance to wife, requiring her to divide property equally among the daughters, creates no trust. *Hopkins v. Glunt*, 111 Pa. St. 287. A trust was declared and an assignment ordered where property, claimed as his own by the trustee, was received in trusts, and so acknowledged before and since. *Hance v. Frome*, 39 N. J. Eq. 324. No trust arises where trust funds have been used in the improvement of land by the owner. *Cross's App.* 97 Pa. St. 471. To A. to permit B. to receive support "in such manner, however, that the same shall not be liable to his debts" raises a trust. *Hooberry v. Harding*, 10 Lea (Tenn.) 392; *Waddingham v. Loker*, 44 Mo. 132. A trust is not created by a death-bed declaration, or an oral agreement, that grantee shall hold land, conveyed by an absolute deed, in trust. *Titcomb v. Morrill*, 10 Allen, 15; *Bartlett v. Bartlett*, 14 Gray, 277. The creation of a trust depends on the settlor's intention, and a grant clearly expressing that the grantee is not to have the benefit, but holds for use of another, will make him a trustee holding title for the beneficial owner. *Mory v. Michael*, 18 Md. 227. Where the intention does not appear, no form of words will create a trust. *Richardson v. Inglesby*, 13 Rich. Eq. 59. The mere calling a deed, mentioned in the recitals of other deeds, a deed of trust does not make it so. *Hurst v. M'Neil*, 1 Wash. 70. Express terms not necessary and may be proved by any proper written evidence disclosing facts creating a fiduciary relation. *Pratt v. Ayer*, 3 Chand. (Wis.) 265; *Starr v. Starr*, 1 Ohio, 321; *Pinney v. Fellows*, 15 Vt. 525. The owner of land gave a bond to secure the same to another, who entered thereon and received the rents, thereby making sufficient declaration that obligor held the estate in trust for the obligee. *Orleans v. Chatham*, 2 Pick. 29. A trust in the executor where a conveyance was made to A. by mortgage, conditioned to become void on payment

ments of that kind, the Court expects demonstration that they relate to the subject-matter (*f*); nor will the trust be executed if the precise nature of the trust cannot be ascertained (*g*); and if the trust be established on the answer of

(*f*) *Forster v. Hale*, 3 Ves. 708, *per* Lord Alvanley; *Morton v. Tewart*, 2 Y. & C. Ch. Ca. 80, *per* Sir J. L. K. Bruce; *Smith v. Matthews*, 3 De G. F. & J. 139.

(*g*) *Forster v. Hale*, 3 Ves. 707; *De G. F. & J. 139.*

to A., as executor of B., of debt due from mortgagor to estate of B. *Williams v. Fullerton*, 20 Vt. 346. A stipulation in a deed that the grantee shall not alien without the consent of his wife, and that if not sold, it shall descend to the heirs of their bodies, does not raise a trust for her. *Huff v. Thomas*, 1 T. B. Mon. 158. Trust may be created by an agreement in a bond; *Barber v. Thompson*, 49 Vt. 213; by directions to continue a business; *Ferry v. Laible*, 31 N.J. Eq. 566; by an agreement to reconvey, though the liability is not changed by a sale and reconveyance by the vendee to the trustee; *Frost v. Frost*, 63 Me. 399; by delivery of notes to secure a balance due to be collected and accounted for; *Ogden v. Larrabee*, 57 Ill. 889; by receipt for purchase money; *Roberts's App.* 92 Pa. St. 407; *Morris v. Webb*, 45 N. Y. Sup'r Ct. 305. Grantee is not affected by the contents of a separate paper of which he is ignorant. *Rogers v. Rogers*, 53 Wis. 36; 40 Am. Rep. 755. A mere intention expressed in letters, that one shall succeed through supposed rule of inheritance, is insufficient. *Russell v. Switzer*, 63 Ga. 711. A trust is created where B. pays for land, taking a conveyance in his own name for the benefit of A. and B., the latter giving a bond to A., to convey one-half to him upon his payment of one-half the purchase money. *Bragg v. Paulk*, 42 Me. 502. A purchaser is bound by trusts inserted in a deed by his directions. *Reilly v. Whipple*, 2 S. C. 277. Creation of a trust by deed was presumed where the attorney for a corporation, bidding in land, took the title in his own name for the sole purpose of conveying it to the corporation. *Wright v. Douglass*, 7 N. Y. 564. A stipulation in a deed absolute on its face, that a part of the conveyed property should be sold and the proceeds accounted for by the grantee, is demonstrative evidence of a trust. *Simpson v. Mitchell*, 8 Yerg. 417. A deed to an administrator, reciting that the grantor had sold, or agreed to sell, and had received a consideration from the intestate, appears on its face to raise a trust for the heirs. *Blythe v. Easterling*, 20 Tex. 565. A. gave B. an acknowledgment that he had received certain property from B. and invested it, a trust being created by implication. *Menude v. Delaire*, 2 Desau. 564. Livery of seisin is not necessary to create a trust in chattels. *Rabun v. Rabun*, 16 La. Ann. 471. A trust may be created by an oral direction to hold in trust for a third person; *Eaton v. Cook*, 25 N. J. Eq. 55; by a wife signing a deed of trust on condition that, when amount is paid, the grantee shall convey to a third person; *Barber v. Milner*, 43 Mich. 248; by delivery of a note to collect and hand the proceeds to a third person; *Walden v. Karr*, 88 Ill. 49. A. conveyed to B., receiving in return an unsealed writing from B., reciting that he had paid A. a certain sum of money and taken a deed, but that on repayment by A., within three years A. should have the improvement or sell a declaration trust from B. to A. *Scituate v. Hanover*, 16 Pick. 222; *Arms v. Ashley*, 4 Pick. 71. In creation of deed of bargain and sale a valuable consideration must be stated, but the amount need not be. *Sprague*

the trustee, the terms of it must be regulated by the whole answer as it stands, and not be taken from one part of the

v. Woods, 4 Watts & S. 192; *Okison v. Patterson*, 1 Watts & S. 395. See, also, *Morrison v. Beirer*, 2 Watts & S. 81. The signature of the person declaring a trust need not be by actual subscription of his name; it is enough if his initials are inserted in the instrument, if its terms and intent are clear, and the party acknowledges his writing. *Smith v. Howell*, 11 N. J. Eq. 349. The deed must show a *cestui que trust* and an interest in, or some right or profit growing out of, the conveyed property. *Eldridge v. See Yup Co.* 17 Cal. 44. A trust may be declared by bill in equity. *Martin v. Tenison*, 26 Ala. 738; *Baylies v. Payson*, 5 Allen, 473; *Price v. Minot*, 107 Mass. 62. See, also, *Freeholders v. Henry*, 41 N. J. Eq. 388; *Page v. Summers*, 70 Cal. 121; *Hobson v. Whitlow*, 80 Va. 784; *Cooper v. Cooper*, 36 N. J. Eq. 121; *Paxton v. Stuart*, 80 Va. 873; *South-Side Co. v. Rhodes*, 33 Kan. 229; *Phelps v. Phelps*, 143 Mass. 570; *Westlake v. Wheat*, 43 Hun (N. Y.) 77; *Chamberlain v. Taylor*, 105 N. Y. 185; *Weeks v. Cornwell*, 104 N. Y. 325; *Lawrence v. Cooke*, 104 N. Y. 632; *Picard v. Central Bank, Sall. (N. B.)* 472; *Att'y Gen. v. Grasett*, 6 Chy. 485; 8 Chy. (Ont.) 130; *Smith v. Stuart*, 12 Chy. (Ont.) 246; *Oxford v. Oxford*, 6 O. R. 6; *Whiteside v. Miller*, 14 Chy. 393; *Charteris v. Charteris*, 100 R. 738; *Kerr v. Read*, 23 Chy. 525; *Dougall v. Dougall*, 26 Chy. 401.

Trust deeds.—Unless there is some reference to, or description of, property conveyed, either in the body of the deed or in the schedules, so that it can be ascertained and identified, the title will not ordinarily pass; the absence of schedules, unless satisfactorily explained, is a suspicious circumstance. *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 282. In a trust deed equity will limit its relief to the contract made and cause a sale only to enforce the trust. *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651. That a party remains in possession after sale cannot affect the validity of the deed, as it is a matter subsequent. *Hempstead v. Johnston*, 18 Ark. 123; 65 Am. Dec. 458. There is a distinction between an unconditional deed of trust and a trust like a mortgage. *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637. A trust deed, however, is but a species of mortgage in many respects. *Wolfe v. Dowell*, 13 Swedes & M. 103; 51 Am. Dec. 147; *Leavitt v. Palmer*, 3 N. Y. 19; 51 Am. Dec. 333; *Brannock v. Brannock*, 10 Ind. Law. 428; 51 Am. Dec. 398. Grantee is not affected by a separate declaration of trust not referred to in the deed or known to the grantee. *Rogers v. Rogers*, 53 Wis. 36; 40 Am. Rep. 756. There must be a grantee willing to accept it. *Jackson v. Bodle*, 20 Johns. 184. In deeds of personalty "heirs" means personal representatives. *Sweet v. Dutton*, 109 Mass. 589; 12 Am. Rep. 744. Where a trust deed gave power to trustee "or his legal representatives" to sell and convey, the power could not be exercised by his administrator, but only by his successor in the trust. *Warnecke v. Lembca*, 71 Ill. 91; 22 Am. Rep. 85. It may include future advances. *Summers & Brannin v. Roos & Co.* 42 Miss. 749; 2 Am. Rep. 653. A voluntary deed purporting to be for the beneficial use of the grantee, and made deliberately without mistake or contrivance, is binding. *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266. If a trust deed recites indebtedness, the presumption is that it remains unpaid. *Graham v. Anderson*, 42 Ill. 514; *Chapin v. Billings*, 91 Ill. 543; *Frederick's App.* 52 Pa. St. 338; 91 Am. Dec. 159. A deed may be reformed which fails to have the proper trusts declared in it. *Walden v. Skinner*, 101 U. S. 577. Recitals in trustee's deed not *prima facie* evidence of their truth. *Vail v. Jacobs*, 62

answer to the rejection of another (*h*); and the plaintiff, if he read the answer in proof of the trust, must at the same

(*h*) *Hampton v. Spencer*, 2 Vern. 288; *Nab v. Nab*, 10 Mod. 404.

Mo. 130. A. conveyed to father without consideration by absolute deed, and then with latter's knowledge but without his consent agreed that the property should be held in trust by a creditor, no trust against the father or his heirs. *Bartlett v. Bartlett*, 14 Gray, 277. For benefit of A. for a homestead for his life, and for B. after said A.'s death, valid. *O'Donnell v. Smith*, 142 Mass. 505. Executors gave deed to trustees, who reconveyed to executors, who again conveyed, title good. *Chesman v. Cummings*, 142 Mass. 65; *Loring v. Eliot*, 16 Gray, 568; *Smith v. Harrington*, 4 Allen, 566. That interpretation will be adopted which seems most nearly to carry out the manifest intention. *Dexter v. Episcopal City Mission*, 134 Mass. 394. To hold for the sole and separate use of a married woman as if a feme sole, and to the use of her issue, her husband can in no way control it without trustee's consent. *Pannill v. Coles*, 81 Va. 380. Construction of trust deeds. *North American Land Co.'s Est.* 83 Pa. St. 493; *Thomas v. Crawford*, 57 Ga. 211; *Badgett v. Keating*, 31 Ark. 400.

Delivery of deed.—If once delivered, it is not impaired by evidence of oral reservation. *Wallace v. Berdell*, 97 N. Y. 13. Deed never delivered to trustee, but deposited for safe keeping with him, with understanding that it should be returned and cancelled on demand and with the consent of the beneficiary, which was done, held a good defence. *Burroughs v. De Couts*, 70 Cal. 361. B. executed deed to K., and B.'s agent had it recorded. There was no pecuniary consideration, and K. knew nothing about it. B. afterwards told K., who orally assented to it, and it began to operate from that time. *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67. A voluntary deed was delivered to the trustee named, who spoke to *cestui que trust* about it and promised to have it recorded; the trustee afterwards returned it, and it was destroyed; held a good delivery. *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 557. It is a sufficient delivery if draughtsman informs the bargainee of its existence and he consents to act as trustee under it. *Green v. Kornegay*, 4 Jones Law, 66; 67 Am. Dec. 261.

Enforcing trusts.—Must first exhaust remedies at law. *Moffatt v. Tuttle*, 35 Minn. 301. May enforce trust to pay debt created by deed from debtor to surety. *Jennings v. National Bank of Athens*, 74 Ga. 782. State trusts are not enforced except where fraudulently concealed by the trustee. *Badger v. Badger*, 2 Wall. 87. If a trust is created by the owner of property, trustee may enforce it anywhere, if by law, within its jurisdiction. *Curtis v. Smith*, 601 Barb. 9. A trust arising from an illegal transaction may be enforced in favor of an innocent party. *Miller v. Davidson*, 3 Gilm. 518; 44 Am. Dec. 715. A trust will be enforced if created and declared, though there be no valuable consideration; but a mere executory trust will not. *Lane v. Ewing*, 31 Mo. 75; 77 Am. Dec. 633. Unless perfectly created, will not be enforced without inquiring into its origin and consideration. *Badgley v. Votrain*, 68 Ill. 25; 19 Am. Rep. 541. If one come into possession of the trust property with notice, the trust will be enforced against him, just as if he were the original trustee.

By whom enforced.—May be by the *cestui que trust*; *Howard v. Gilbert*, 39 Ala. 726; one trustee against another; *Faulkner v. Thompson*, 14 Ark. 478; by attorney-general against eleemosynary institution; *Chambers v. Baptist Ed. Soc.* 1 B. Mon. 215; by any beneficiary having an interest in the use;

time read from it the particular terms of the trust (*i*). When the trust is manifested and proved by letters, parol evidence may be admitted to show the position in which the writer then stood, the circumstances by which he was surrounded, and the degree of weight and credit to be attached to the letters, independently of any question of construction (*j*).

4. **The writing must be signed.**—It will be observed, that the words of the statute require the writing to be *signed* (*k*); and not only the fact of the trust, but also the terms of it, must be supported by evidence under signature (*l*); but, as in the analogous case of agreements under the fourth section of the Act (*m*), the terms of the trust may be collected from a paper *not signed, provided such paper can be clearly connected with, and is referred to by, the writing that is signed (*a*).

5. **Who is the party "enabled to declare the trust."**—The signature must be by the party "who is by law enabled to declare such trust." It has been occasionally contended, that by this description was meant the person seised or possessed of the *legal estate*; but it has been decided that whether the property be real (*b*), or personal (*c*), the party

(*i*) *Freeman v. Tatham*, 5 Hare, 329.

(*j*) *Morton v. Tewart*, 2 Y. & C. Ch. Ca. 67, see 77.

(*k*) See *Denton v. Davies*, 18 Ves. 503.

(*l*) *Forster v. Hale*, 3 Ves. 707, per Lord Alvanley; *Smith v. Matthews*, 3 De G. F. & J. 139.

(*m*) See *Sug. Vend. & Purch.* 14th ed. ch. 4, s. 3.

(*a*) *Forster v. Hale*, 3 Ves. 696.

(*b*) *Tierney v. Wood*, 19 Beav. 330; [*Kronheim v. Johnson*, 7 Ch. D. 60; *Dye v. Dye*, 13 Q. B. D. 147.] see *Donohoe v. Conrahy*, 2 Jones & Lat. 688.

(*c*) *Bridge v. Bridge*, 16 Beav. 315; *Ex parte Pye*, 18 Ves. 140, &c.

Baptist Church v. Presb. Church, 18 B. Mon. 635; *Gilbert v. Sutliff*, 30 Ohio St. 129; by indorser of draft against consignee of goods; *Bank v. Gardner*, 15 Gray, 362; by a new administrator against the old; *Scott v. Searles*, 7 Sm. & M. 498; by *cestui que trust* against trustee after death of grantor; *Tritt v. Crotzer*, 13 Pa. St. 451; by a *cestui que trust* with a vested interest, but not an immediate right of enjoyment; *Cooper v. Day*, 1 Rich. Eq. 26; against all persons in possession with notice of the trust; *Lathrop v. Bampton*, 31 Col. 17; *Shibla v. Ely*, 6 N. J. Eq. 181.

Trusts will not be enforced by one having mere possibility of becoming a beneficiary; *Female Asso. v. Beekman*, 21 Barb. 565; or by one tainted with fraud in acts from which trust arose; *Tipton v. Powell*, 2 Cold. Tenn.

enabled to declare the trust is the owner of the beneficial interest, and who has therefore the absolute control over the property, the holder of the legal estate being a mere instrument or conduit pipe. [Where, therefore, an antenuptial agreement that the intended wife's realty should belong to her for her separate use was signed only by the husband, the fee was not affected by the agreement so as to enable the wife to devise it as separate property (*d*). It was held in a recent case by Cave, J., that a parol agreement, entered into in contemplation of a marriage, that property consisting of a sum of money standing to the credit of the wife in her maiden name at her banker's should belong to her for her separate use, but not followed by any transfer to trustees, did not constitute a good antenuptial settlement; but the Court of Appeal, while reversing the decision upon other grounds, withheld their opinion upon the point.¹]

SECTION III.

OF THE STATUTES OF WILLS.

1. **Statute of frauds.**—By the fifth section of the Statute of Frauds (*e*), all devises of *lands* are required to be in writing and signed by the testator, or by some person in his presence and by his direction, and to be attested or subscribed in his presence by three witnesses; and by the nineteenth section, all bequests of *personal* estate are required to be in writing, with the exception of certain specified cases in which nuncupative wills were allowed (*f*).² And by the 1 Vict.

[(*d*) *Dye v. Dye*, 13 Q. B. D. 147.] (*f*) See *Adlington v. Cann*, 3 Atk.
(*e*) 29 Car. 2. c. 3. 151.

19; nor a voluntary trust against a grantor or his representatives; *Borum v. King*, 1 Ad. 37 Ala. 606; nor against a third person without notice; *McCaskill v. Lathrop*, 63 Ga. 96.

¹ *Ex parte Whitehead*, 14 Q. B. D. 419.

² The statute relating to the execution of wills has been very generally enacted in the United States. See the statutes of the various states. The same formalities are required in the case of personal property as in devising real estate. 1 Jarm. on Wills, 113-144. A will, to establish a trust expressed in it, must be valid as a will. *Anding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658; *Campbell v. Wallace*, 10 Gray, 162; *Ives v. Allyn*, 12 Vt. 589; *Thayer v. Wellington*, 9 Allen, 283; *Johnson v. Clarkson*, 8 Rich. Eq. 305; *Brown v.*

c. 26, s. 9, wills made on or after January 1, 1838, whether of real or personal estate, must be executed and attested with the special solemnities there mentioned.

2. **Principle of rejecting declarations not testamentary in respect of wills.**—To trace the operations of these enactments we must bear in mind that the absolute owner of property combines in himself both the legal and equitable interest, and when the legislature enacts that no devise or bequest of property shall be valid without certain ceremonies, a testator cannot by an informal instrument affect the equitable, [*58] any more than the legal, estate, for the one is a *con-

Brown, 12 Md. 87; Lomax v. Ripley, 3 Sm. & Gif. 48; Bailey v. Bailey, 8 Ohio, 239. An executor is *prima facie* a trustee for the next of kin. Hays v. Jackson, 6 Mass. 153; Paup v. Mingo, 4 Leigh, 163; Carson v. Carson, 6 Allen, 397; Tinnin v. Womach, 1 Jones Eq. 135. A trust may be established in an absolute bequest by showing that the legatee received it on promise to testator to provide for a third person out of it. Towles v. Burton, Rich. Eq. Cas. 146; 24 Am. Dec. 409; Owing's case, 1 Bland's Ch. 370; 17 Am. Dec. 311; Thomson v. White, 1 Dall. 424; 1 Am. Dec. 252; Barrell v. Hanrick, 42 Ala. 60; De Laurencel v. De Boom, 48 Cal. 581; but see Lantry v. Lantry, 51 Ill. 458; 2 Am. Rep. 310; Hoge v. Hoge, 1 Watts, 163; 26 Am. Dec. 52. Or if words elsewhere in will showed it. Major v. Herndon, 78 Ky. 123. A trustee cannot continue a trust by his will. Fonda v. Penfield, 56 Barb. 503. From will and codicil together may establish trust, and executors may be considered the trustees. Ward v. Ward, 106 N. Y. 68. No fixed or certain form of words necessary. Blake v. Dexter, 12 Cush. 559; Cockrill v. Armstrong, 31 Ark. 580. Trust, though in ambiguous terms, will be sustained. Shepard v. Gassner, 41 Hun, 326. Evident intention is sufficient; Hoxie v. Hoxie, 7 Paige, 187; so if object, property, and disposition shown; Inglis v. Snug Harbor, 3 Pet. 119; and even if no trustee is named; Varner's App. 80 Pa. St. 140; Maus v. Maus, 80 Pa. St. 194; but not if donee is uncertain; Society v. Bowen, 21 Hun, 389. Trust may be opened to take in a child yet unborn. Gaboury v. McGovern, 74 Ga. 133. An executor appointed by surviving executor in place of one deceased, under a provision of the will, is also clothed with the trust estate like his predecessor. Mulford v. Mulford, 42 N. J. Eq. 68. Direction to pay net income, with power to sell, a trust. Marx v. McGlynn, 88 N. Y. 357. Devise of two equal shares to son, intending one for daughter, creates a trust. Cook v. Redman, 2 Ired. Eq. 623. To A. for life, remainder to heirs, a dry trust, executed by Statute of Uses. Phila. Trust & Safe Dep. Co.'s App. 93 Pa. St. 209. So where to wife, for "benefit of herself and children." Clarke v. Leupp, 88 N. Y. 228. Devise to trustee, with no power of control or disposition, is ineffectual, and the estate vests immediately in the beneficiary. Allen v. Craft, 109 Ind. 476. Nuncupative wills, under certain circumstances, are allowed in most of the states. A legacy to A., with "request" that on his death he leave it to B., C., and D., creates a trust in their favor. Eddy v. Hartshorne, 34 N. J. Eq. 419. A part to E. I wish placed in trust, and if she leaves no children, to be paid to her sister M. Hooper v. Bradbury, 133 Mass. 303.

stituent part of the ownership as much as the other. Thus, if a testator by will duly signed and attested give lands to A. and his heirs "*upon trust*," but without specifying the particular trust intended, and then by a paper, not duly signed and attested as a will or codicil, declare a trust in favour of B., the beneficial interest under the will is a part of the original ownership and cannot be passed by the informal paper, but will descend to the heir-at-law, or if the will be made since 1837, and contain a residuary devise, will pass to the residuary devisee. So if a legacy be bequeathed by a will, duly executed, to A. "*upon trust*," and the testator, by parol, express an intention that it shall be held by A. upon trust for B., such a direction is in fact a testamentary disposition of the equitable interest in the chattel, and therefore void by the statute, which requires a will duly executed. If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and therefore that where the *legal estate* of a freehold is well devised, a *trust* may be engrafted upon it by a simple note in writing; and where a chattel personal is well bequeathed, a trust of it, as excepted from the seventh section of the Statute of Frauds, may be raised by a mere parol declaration; the answer is, that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. "A deed," observed Mr. Justice Buller, in a similar case, "must take place upon its execution, or not at all; it is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing the interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death" (a). [It seems therefore on principle], that if the intended disposition be of a testamentary character, and not to take effect in the testator's lifetime, but to be ambulatory until his death, such disposition is inoperative unless it be declared in writing in conformity with the statutory enactments regulating devises and bequests (b).

(a) *Habergham v. Vincent*, 2 Ves. jun. 230.

(b) [See, however, *Re Fleetwood*, 15 Ch. D. 594; *Re Boyes*, 26 Ch. D.

[*59] * 3. Where no trust appears on the will and no fraud. — If a testator, by his will, devise an estate, and the devisee, so far as appears on the face of the will, is intended to take the beneficial interest, and the testator leaves a declaration of trust not duly attested, and not communicated to the devisee and assented to by him in the testator's lifetime, the devisee is the party entitled both to the legal and beneficial interest: for the estate was well devised by the will, and the informal declaration of trust is not admissible in evidence (a).

531.] The law laid down by Jenkins, 3 Cent. Cas. 26, is founded on mistake, as from the report of the case in Fitzherb. Ab. Devise, 22, it appears that the beneficial interest was decreed to the heir, not, as Jenkins supposed, of the devisee, but of the testator.

In *Metham v. Devon*, 1 P. W. 529, a testator by his will directed his executors to pay 3000*l.* as he should by deed appoint, and subsequently by deed appointed the 3000*l.* to certain children, and the Court established the gift to the children on the ground that the deed referred to the will, and was part thereof, and in the nature of a codicil. It does not appear whether the deed had been proved with the will, but it might have been, as, though a deed in form, it was of a testamentary character. If the deed was not proved, or assumed to have been proved, it is difficult to find any principle upon which the case can be supported from the brief statement of it in the report.

In *Inchiquin v. French*, 1 Cox, 1, a testator devised all his real estate, charged with debts and legacies, in strict settlement, and gave a legacy of 20,000*l.* to Sir Wm. Wyndham; by a deed poll of even date with his will, the testator declared that the 20,000*l.* was given to Sir Wm. Wyndham upon trust for Lord Clare. "The deed poll," adds Mr. Cox, the reporter, "does not appear to have been proved as a testamentary paper;" and according to the same report, Lord Hardwicke decreed that the legacy of 20,000*l.*

given to Sir Wm. Wyndham, and by the codicil declared to be in trust for Lord Clare, was a subsisting legacy. It might be inferred from this statement, that Lord Hardwicke admitted the deed poll as a declaration of trust; but it will be observed that he calls it a codicil, and from the report of the same case in Ambler, p. 33, we learn the facts, viz., that Lord Clare was out of the jurisdiction, and Lord Hardwicke declined to entertain the question as to Lord Clare's right in his absence; but the counsel, for all parties, desiring his Lordship to determine whether, assuming the legacy to be valid, it was to be paid out of the real or personal estate, his Lordship held, that as the will contained a general charge of legacies and the gift by the codicil, though not attested according to the Statute of Frauds, was a legacy, it was raisable primarily out of the personal estate, and then out of the real estate. This was the only point determined by him.

The dictum of Lord Northington, in *Boson v. Statham*, 1 Eden. 514, is clearly not law; see *Adlington v. Cann*, 3 Atk. 151; *Muckleston v. Brown*, 6 Ves. 67; *Stickland v. Aldridge*, 9 Ves. 519; and see *Puleston v. Puleston*, Finch, 312.

(a) *Adlington v. Cann*, 3 Atk. 141; *Juniper v. Batchelor*, 19 L. T. N. S. 200; and see *Stickland v. Aldridge*, 9 Ves. 519; and the observations of Sir J. L. K. Bruce in *Briggs v. Penny*, 3 De G. & Sm. 547.

This doctrine, of course, does not interfere with the well-known rule, that a testator may, *by his will, refer to and incorporate therein*, any document which at the date of the will has an actual existence, and is thus made part of the will.

4. Where the devisee is made by the will a trustee, and the testator leaves an informal declaration of trust.—Should the testator devise the estate in such language that the will passes the *legal* estate only to the devisee, and manifests an intention of not conferring the equitable, in short, *stamps the devisee with the character of trustee*, and yet does not define the particular trusts upon which he is to hold; in this case, no paper not duly attested (except of course papers existing at the date of the will, and incorporated by reference) will be admissible to prove what were the trusts intended (*b*). Nor will the devisee be allowed * to [*60] retain the beneficial interest himself; but while the legal estate passes to him, the equitable will, according to the date and terms of the will, result to the testator's heir-at-law or general residuary devisee (*a*).

5. *Personal estate*.—So if by will, *personal estate* be given upon trusts to be *afterwards* declared, the testator cannot by any instrument not duly executed as a will, and *a fortiori* he cannot by parol, declare a valid trust, but the equitable interest will result to the next of kin, or pass the residuary legatee (*b*). [And the same rule will be applied if the bequest be on the face of the will a beneficial one, but the legatee undertakes to hold upon trusts to be afterwards declared (*c*). .

6. But where personal estate was by codicil given to a legatee "to be applied as I have requested him to do," and

[(*b*) See, however, *Re Fleetwood*, 15 Ch. D. 594.]

(*a*) *Muckleston v. Brown*, 6 Ves. 52; [*Scott v. Brownrigg*, 9 L. R. Ir. 246;] *Bishop v. Talbot*, as cited 6 Ves. 60, was a devise to trustees in trust, but on consulting the Reg. Lib. it appears there was no notice of the trust upon the will, Reg. Lib. 1772, A. Fol. 137. In *Boson v. Statham*, 1

Eden. 508, the devisees were described as trustees, but this circumstance was not adverted to by the counsel or the Court.

(*b*) *Johnson v. Ball*, 5 De G. & Sm. 86; [*Scott v. Brownrigg*, 9 L. R. Ir. 246; see *Riorden v. Banon*, 10 I. R. Eq. 469; *Re Boyes*, 26 Ch. D. 531; *Re Fleetwood*, 15 Ch. D. 594.]

[(*c*) *Re Boyes*, 26 Ch. D. 531.]

an unsigned memorandum was written out by the legatee at the time of executing the codicil containing the wishes of the testator, it was held by V. C. Hall that the Court would execute the trust (*d*).]

7. Admission and rejection of parol evidence as against the title of executors. — So if a person before the Act of 11 G. 4. & 1 W. 4, c. 40, had been simply appointed executor, which conferred upon him a title to the surplus beneficially, averment was not admissible to make him a trustee for the next of kin (*e*). But apparently, the authorities established that if from any circumstance appearing on the face of the will, as the gift of a legacy to the executor, the law *presumed* only that he was *not* intended to take the surplus beneficially, the executor might rebut that presumption by the production of parol evidence (*f*), when of course the next of kin might fortify the presumption by opposing parol evidence in contradiction. Where, however, the will itself invested the executor with the character of trustee, as by giving him a legacy “for his trouble,” or by styling him a “trustee” expressly, the *prima facie* title to the surplus was then in the next of kin, and parol evidence was not admissible

[*61] *to disprove the express intention (*a*). By the act referred to, an executor is made *prima facie* a trustee for the next of kin (*b*). But where there are *no next of kin* the title of the executor, as against the *Crown*, is not affected by the statute, and the old law applies (*c*). But if the executor be stamped by the will with the character of trustee, and there are no next of kin, the *Crown* will take (*d*). And of course, whether there be next of kin or not, if it appear from

[(*d*) *Re Fleetwood*, 15 Ch. D. 594; and see *Re Boyes*, 26 Ch. D. 531.]

(*e*) *Langham v. Sandford*, 19 Ves. 664, *per* Lord Eldon; *White v. Williams*, 3 V. & B. 72; S. C. Coop. 58; [see *Stewart v. Stewart*, 15 Ch. D. 539.]

(*f*) *Walton v. Walton*, 14 Ves. 322, *per* Sir W. Grant; *Clennell v. Lewthwaite*, 2 Ves. Jun. 474; *Langham v. Sandford*, 17 Ves. 442, 443; *Lynn v. Beaver*, 1 T. & R. 66.

(*a*) *Rachfield v. Careless*, 2 P. W.

158; *Langham v. Sandford*, 17 Ves. 453; S. C. 19 Ves. 641; *Golding v. Yapp*, 5 Mad. 59; *White v. Evans*, 4 Ves. 21; *Walton v. Walton*, 14 Ves. 322, *per* Sir W. Grant; and see *Read v. Stedman*, 26 Beav. 495.

(*b*) *Love v. Gaze*, 8 Beav. 472; *Juler v. Juler*, 29 Beav. 34; *Travers v. Travers*, 14 L. R. Eq. 275; [*Stewart v. Stewart*, 15 Ch. D. 539.]

[(*c*) So now decided, *Re Knowles*, 49 L. J. N. S. Ch. 625.]

(*d*) *Read v. Stedman*, 26 Beav.

the whole will that the executors were intended to take beneficially, the statute is excluded (*e*).

8. **Fraud.**—An exception to the rule, that parol trusts cannot be declared upon an estate devised by a will, exists in the case of fraud. The Court will never allow a man to take advantage of his own wrong, and therefore if an heir, or devisee, or legatee, or next of kin, contrive to secure to himself the succession of the property through fraud, the Court affects the conscience of the legal holder, and converts him into a trustee, and compels him to execute the disappointed intention.

Case of fraud in heir.—Thus if the owner of an estate hold a conversation with the heir, and be led by him to believe that if the estate be suffered to descend, the heir will make a certain provision for the mother, wife, or child of the testator, a Court of Equity, notwithstanding the Statute of Wills, will oblige the heir to make a provision in conformity with the express or implied engagement; for the heir ought to have informed the testator that he, the heir, would not hold himself bound to give effect to the intention, and then the testator would have had the opportunity of intercepting the right of the heir by making a will (*f*).

In devisee.—So if a father devise to his youngest son, who promises that if the estate be given to him he will pay 10,000*l.* to the eldest son, the Court, at the instance of the eldest son, will compel the youngest son to disclose what passed between him and the testator, and if he acknowledge the engagement, though he pray the benefit *of the statute in bar, he will be a trustee for the [*62] eldest son to the extent of 10,000*l.* (*a*).

In legatee.—And so, generally, if a testator devise real estate or bequeath personal estate to A., *the beneficial owner upon the face of the will*, but upon the understanding between

495; [Dillon v. Reilly, 9 L. R. Ir. 57; *Re Mary Hudson's Trusts*, 52 L. J. N. S. Ch. 789.]

(*e*) Harrison v. Harrison, 2 H. & M. 237; and see Williams v. Arkle, 7 L. R. H. L. 606.

(*f*) Sellack v. Harris, 5 Vin. Ab.

521; Stickland v. Aldridge, 9 Ves. 219, *per* Lord Eldon; Harris v. Horwell, Gilb. Eq. Rep. 11; McCormick v. Grogan, 4 L. R. H. L. 88, *per* L. C. (a) Stickland v. Aldridge, 9 Ves. 519.

the testator and A. that the devisee or legatee will as to a part or even the entirety of the beneficial interest hold upon any trust which is *lawful* in itself, in favour of B., the Court, at the instance of B., will affect the conscience of A., and decree him to execute the testator's intention (b). But in this, as in other cases, if it appear that A. was not meant to be a trustee, but to have a mere discretion, the Court cannot convert the arbitrary power into a trust (c).

[9. **Intention not communicated.** — But where the bequest was on the face of the will a beneficial one, and the understanding between the testator and the legatee was, that he should take the property as trustee upon trust to deal with it according to further directions which the testator was to give by letter, and the testator subsequently wrote letters containing the directions, but never sent them or communicated their contents to the legatee, it was held that the legatee was a trustee for the next of kin; and it was considered to be essential for the validity of the trust that it should be communicated to the legatee in the testator's lifetime, and that he should *accept the particular trust* (d).

10. **Admission by one joint tenant.** — Where property was devised to four persons as joint tenants, and one of them in his will made certain statements which pointed to a secret trust, it was held that these statements could not affect the

(b) *Kingsman v. Kingsman*, 2 Vern. 559; *Drakeford v. Wilks*, 3 Atk. 539; *Attorney-General v. Dillon*, 18 Ir. Ch. Rep. 127; *Gray v. Gray*, 11 Ir. Ch. Rep. 218; *Barrow v. Green*, 3 Ves. 152; *Marriot v. Marriot*, 1 Strange, 672, *per Cur.*; *Segrave v. Kirwan*, 1 Beatt. 164, *per Sir A. Hart*; *Leister v. Foxcroft*, cited *ib.*; *Chamberlaine v. Chamberlaine*, 2 Eq. Ca. Ab. 43; *ib.* 465; *Irvine v. Sullivan*, 8 L. R. Eq. 673; *Norris v. Frazer*, 15 L. R. Eq. 318; *Thynn v. Thynn*, 1 Vern. 296; *Devenish v. Baines*, Prec. in Ch. p. 3; *Oldham v. Litchford*, 2 Vern. 506; *S. C. Freem.* 284; *Reech v. Kennigate*, Amb. 67; *S. C.* 1 Ves. 123; *Newburgh v. Newburgh*, 5 Madd. 266, *per Sir John Leach*; *Chamberlain v. Agar*, 2 Ves. & B. 259; *Nab*

v. Nab, 10 Mod. Rep. 404; *Strode v. Winchester*, 1 Dick. 397; *S. C.* stated from Reg. Lib. App. No. 1 to 3d edition of the present work; and see *Alison's case*, 9 Mod. Rep. 62; *Dixon v. Olmius*, 1 Cox, 414. But in the case put, B. takes by the rules of equity, and not by testamentary disposition, and, therefore, where A. had undertaken, at the request of a testatrix in Ireland to hold for a charity, he paid legacy duty as beneficial owner, though by the Irish Stamp Acts a legacy to a charity was exempted; *Cullen v. Attorney-General*, 1 L. R. H. L. 190.

(c) *McCormick v. Grogan*, 1 I. R. Eq. 313; 4 L. R. H. L. 82; *Creagh v. Murphy*, 7 I. R. Eq. 182.

[(d) *Re Boyes*, 26 Ch. D. 531.]

rights of the survivor of the joint tenants, and in the absence * of other evidence his representatives were [*63] held to be entitled to the property (a).]

11. **Engagement to execute an unlawful trust.**—It often happens that a proposed devisee enters into an engagement with the testator in his lifetime to execute a secret trust of an *unlawful* character, one which the policy of the law does not allow to be created by will.¹ In this case the Court will not suffer the devisee to profit by his fraud, but on proof of the fact raises a resulting trust in favour of the testator's heir-at-law. If, therefore, a testator devise an estate in words carrying upon the face of the will the beneficial interest, and obtain a promise from the devisee either expressed or tacitly implied that he will hold the estate upon trust for a charitable purpose, the heir-at-law, as entitled to a resulting trust,

[(a) *Turner v. Attorney-General*, 10 I. R. Eq. 386.]

¹ *Secret trusts.*—If a fraudulent trust appear in an answer, a trust will be created in favor of those interested in the estate; *Robinson v. King*, 6 Ga. 539; a Court of Equity will compel discovery, enforce the trust if lawful, declare it void if unlawful—where done by fraud, circumvention, accident, mistake, or design; *Brown v. Clegg*, 6 Ired. Eq. 90; 61 Am. Dec. 418; if it is claimed that a person purchased with notice of a secret trust, clear proof of actual facts must be shown, sufficient to put a party on inquiry, and with ordinary diligence lead to knowledge of it; *Wilson v. McCullough*, 23 Pa. St. 440; 62 Am. Dec. 347; a bill of sale privately understood to be a mortgage creates a secret trust as to surplus in favor of vendor, and is void as to creditors; *Chenery v. Palmer*, 6 Cal. 119; 65 Am. Dec. 493; *Hodgkins v. Hook*, 23 Cal. 584; a *bona fide* purchaser of corporate stock, without notice, will be protected against a secret trust in favor of a third person, where such person by his voluntary act has conferred an apparent right of property in stock on the vendor; *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291; a secret trust inconsistent with the terms of the sale of property, though evidence of fraud, if not satisfactorily accounted for, is not fraud *per se*, nor conclusive evidence of it, and it is immaterial whether the property is real or personal; *Oriental Bank v. Haskins*, 3 Met. 332; 37 Am. Dec. 140; see, also, *Murphy v. Mariland*, 8 Cush. 577; *Lynde v. McGregor*, 13 Allen, 181; *Crowninshield v. Kittridge*, 7 Met. 524; *Harvey v. Varney*, 98 Mass. 120; to enforce a secret trust an honest purpose must be shown; *Patton v. Beecher*, 62 Ala. 579; a trustee purchased land in his own name with his wife's money; trust results to the wife, in conveyance of which she joins, good if purchaser has no knowledge of her incapacity; *Gray v. Turley*, 110 Ind. 254; A., holding stock, dealt with it as his own, transferring it to B., and B. to C., neither B. nor C. having any knowledge of the trust; *Borland v. Clark*, 26 Kan. 349; an express trust by secret agreement may be enforced; *Thompson v. Newlin*, 6 Ired. Eq. 380; but a secret trust was not sustained in *Conover v. Beckett*, 38 N. J. Eq. 384.

may bring an action against the devisee, and compel him to answer whether there existed any such understanding between him and the testator; and if the defendant acknowledge it, he will be decreed a trustee for the plaintiff, and to convey the estate to him accordingly (*b*).

12. **Devise may be good as to one and void as to another.** — Where a devise is to several persons as tenants in common, it may be void as to one to whom the testator's unlawful intention was communicated in his lifetime, and good as to the others who were not privies to his intention (*c*). But if there be a joint devise to two, one of whom has by active fraud procured the devise, the other cannot claim under the fraud, but the devise will be void as to both (*d*).

13. **Devise not void because devisee means to execute the unlawful trust.** — Where no trust is imposed by the will, and no communication was made in the testator's lifetime, the devise will be good, although the devisee may, notwithstanding the absence of legal obligation, be disposed from the bent and impulse of his own mind, to carry out what he believes to have been the testator's wishes (*e*).

[*64] *14. **An engagement to hold an indefinite part of the estate upon an unlawful trust.** — A devise may be a beneficial one upon the face of a will, but there may have existed an understanding between the testator in his lifetime and the devisee, that, without any particular part of the estate being specified, such portions of it as the devisee, in

(*b*) *Adlington v. Cann*, Barn. 130; *Springett v. Jennings*, 10 L. R. Eq. 488; *Burr v. Miller*, W. N. 1872, p. 63; *King v. Lady Portington*, 1 Salk. 162; *Muckleston v. Brown*, 6 Ves. 52; *Stickland v. Aldridge*, 9 Ves. 516; *McCormick v. Grogan*, 1 I. R. Eq. 313; 4 L. R. H. L. 82; and see *Attorney-General v. Duplessis*, Park. 144; *Russell v. Jackson*, 10 Hare, 204; *Tee v. Ferris*, 2 K. & J. 357; *Lomax v. Ripley*, 3 Sm. & G. 48; *Carter v. Green*, 3 K. & J. 591; *Burney v. Macdonald*, 15 Sim. 6; *Moss v. Cooper*, 1 J. & H. 352; *Baker v. Story*, W. N. 1874, p. 211.

(*c*) *Tee v. Ferris*, 2 K. & J. 357; [*Rowbotham v. Dunnnett*, 8 Ch. D. 430]; and see *Burney v. Macdonald*, 15 Sim. 6; *Moss v. Cooper*, 1 J. & H. 352.

(*d*) *Russell v. Jackson*, 10 Hare, 204; and see *Carter v. Green*, 3 K. & J. 603; *Burney v. Macdonald*, 15 Sim. 6.

(*e*) *Wallgrave v. Tebbs*, 2 K. & J. 313; *Lomax v. Ripley*, 3 Sm. & G. 48; *Jones v. Badley*, 3 L. R. Eq. 635, reversed, 3 L. R. Ch. App. 362; and see *Carter v. Green*, 3 K. & J. 591; [*Rowbotham v. Dunnnett*, 8 Ch. D. 430.]

the exercise of his discretion, might think proper, should be applied to a charitable purpose. Under such circumstances the heir of the testator would have a right to interrogate the devisee whether he has exercised that discretion, and to call for a conveyance of so much as the devisee may have made subject to the unlawful purpose (*a*).

15. **Defendant must discover what the secret trust was.** — In the above cases it is not a sufficient answer to an action by the heir for the defendant to say that the secret trust is *not for the plaintiff*, for thus the devisee makes himself the judge of the title. The trust may be for a charity, and if so, the beneficial interest would result for want of a lawful intention, or the equitable interest might, on some other ground, enure to the heir as undisposed of (*b*). If the defendant deny the trust by his answer, the fact in this, as in other cases of fraud, may be established against him by parol evidence (*c*).

16. **Engagement to execute a trust and no trust declared.** — It is clear that if the devisee enters into an engagement with the testator to execute an unlawful trust, the heir may bring an action, and claim the beneficial interest; but suppose the devise is a beneficial one upon the face of it, and the testator communicates his will to the devisee, and requests him to be a trustee for such purposes as the testator shall declare, which the devisee undertakes to do, but the testator afterwards *dies without having expressed any trust*, it seems that in this case also the devisee will not be allowed to take the beneficial interest, but the heir-at-law will be entitled (*d*).

17. **Case of devisee made a trustee on face of the will, and parol declaration of trust for a stranger.** — Another case, distinct from all the preceding, is where a testator *devises an estate to persons as trustees*, but no trusts are declared by the will, so that the equitable interest would, upon the face of

(a) *Muckleston v. Brown*, 6 Ves. 69.

[*Riordan v. Banon*, 10 I. R. Eq. 469.]

(b) *Newton v. Pelham*, cited *Boson v. Statham*, 1 Eden, 514; [*Re Boyes*, 26 Ch. D. 531.]

(d) *Muckleston v. Brown*, 6 Ves. 52; [*Re Boyes*, 26 Ch. D. 531.] See also the observations of V. C. (afterwards L. J.) Turner, in *Russell v. Jackson*, 10 Hare, p. 214.

(c) *Kingsman v. Kingsman*, 2 Vern. 599; *Pring v. Pring*, 2 Vern. 99;

the instrument, result to the heir-at-law, and the testator *inform the devisees* that his intention in making the devise is, that they shall hold the estate *in trust for certain persons*, which the devisees undertake to do. Will the Court, under

such circumstances, compel the devisees *to execute the* [*65] *parol intention*, or will *the equitable interest result to the *heir*? In favour of the parol trust, it will be argued that the testator left his will in the form in which it appears, under the impression that his object, verbally communicated, would be carried out, and that the trust can therefore be supported, on the ground of mistake in himself, or fraud in the devisees in not apprising the testator that the trust could not be executed. To this the answer is, that, upon the face of the will, the equitable interest results to the heir-at-law, and that, if the testator has not disposed of the equitable interest, as required by the statute, the Court cannot make a will for him, on the plea of mistake or fraud (*a*): that the Court has interfered in the case of fraud in those instances only where the *devisee* taking the beneficial interest under the will, was the contriver of the fraud, and, as no man may take advantage of his own wrong, the Court compels the devisee to execute the intention fraudulently intercepted: but in the case supposed, the *legal estate* only is in the *devisees*, while the beneficial interest is in the heir-at-law, who is wholly disconnected from the fraud. What jurisdiction, therefore, has the Court to act upon the conscience of the heir, to deprive him of that estate, which has not been devised away according to the Statute of Wills? and how can the trustees for the heir be held to be trustees for another in the absence of all fraud on the part of the heir? It would seem, upon principle, that where a trust results upon the face of the will, the circumstance of an express or implied promise on the part of the devisee to execute a certain trust is not a sufficient ground for authorising the Court to execute the trust as against the heir-at-law (*b*).

(*a*) *Newburg v. Newburg*, 5 Madd. 364.

(*b*) The cases upon the subject are *Pring v. Pring*, 2 Vern. 99; *Crooke*

v. Brooking, 2 Vern. 50, 107; *Smith v. Attersoll*, 1 Russ. 266; *Podmore v. Gunning*, 7 Sim. 644. Other cases are not uncommonly referred to, but

[18. **Case of parol declaration of trust of a legacy for a stranger.**—However, in a recent case in Ireland where a pecuniary legacy was given “to be disposed of by the legatee in a manner of which he alone should be cognizant, and as contained in a memorandum which the testator should leave with him,” and the testator before the execution of the will verbally informed the legatee of the manner in which he was to dispose of the legacy, to which the legatee assented, it was held that there was a valid trust, and that the legacy was to be applied according to the * testator’s [*66] directions, to the exclusion of the claims of the residuary legatees (a).]

19. **Effect of the Statute of Mortmain.**—We have stated the rule that if a testator make a devise carrying the beneficial interest on the face of the will, but it appears from the admission of the devisee or by evidence that the devisee was pledged to the testator to execute a charitable trust, the Court will not allow the execution of such a trust, but will give the estate to the heir-at-law. The question here suggests itself, whether the Statute of Mortmain (b), which declares a devise “in trust or for the benefit of” a charity to be absolutely void, applies to such a case, so as not only to defeat the equitable interest admitted or proved to have been intended for a charity, but also to make void the devise of the legal estate itself, so that by the effect of the statute, when the fact has been established, the devisee takes no interest either at law or in equity. After some conflict of authority (c), it has now been decided that the devise of the legal estate is good, but that equity will set it aside on the ground of fraud, upon public policy (d).

which really have no application,—as *Jones v. Nabbe*, Gilb. Eq. Rep. 146 (but there the money passed, and the parol trust was declared in the lifetime of the testator); *Inchiquin v. French*, 1 Cox, 1; *Metham v. Devon*, 1 P. W. 529; as to which last two cases, see the observations at page 59, *supra*.

[(a) *Riordan v. Banon*, 10 I. R. Eq. 469; *Re Fleetwood*, 15 Ch. D. 594.]

(b) 9 G. 2. c. 36.

(c) See *Adlington v. Cann*, 3 Atk. 141, 150, & 153; *Edwards v. Pike*, 1 Eden, 267; *Boson v. Statam*, 1 Eden, 508; *Bishop v. Talbot*, cited *Muckleston v. Brown*, 6 Ves. 60, 67, Reg. Lib. A. 1772, fol. 137, A. 1773, fol. 686.

(d) *Sweeting v. Sweeting*, 3 N. Rep. 240.

The provisions of the Statute of Frauds relating to wills have now been repealed, but the principles established by the foregoing cases with reference to the Statute of Frauds will apply, *mutatis mutandis*, to the enactments of the Statute of Wills at present in force.

OF TRANSMUTATION OF POSSESSION.

WHERE *there is valuable consideration*,¹ and a trust is intended to be created, formalities are of minor importance, since if the transaction cannot take effect by way of trust executed, it may be enforced by a Court of Equity as a contract. But *where there is no valuable consideration*, and a trust is intended, it has been not unfrequently supposed that, in order to give the Court jurisdiction, there must be *Transmutation of possession*—i.e., the legal interest must be divested from the settlor, and transferred to some third person. But upon a careful examination of the authorities the principle will be found to be, that whether there was transmutation of possession or not, the trust will be supported—provided it was in the first instance *perfectly created (a)*.

The cases upon this subject may be marshalled under the following heads:—

1. *Where some further act is intended.*—It is evident that a trust is *not perfectly created* where there is a *mere intention* of creating a trust, or a *voluntary agreement* to do so, and the

(a) See *Ellison v. Ellison*, 6 Ves. 647; *Meek v. Kettlewell*, 1 Hare, 469; 662; *Pulvertoft v. Pulvertoft*, 18 Ves. Fletcher v. Fletcher, 4 Hare, 74; 99; *Sloane v. Cadogan*, Sug. Vend. & Price v. Price, 14 Beav. 598; *Bridge v. Bridge*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285; *Donaldson v. Donaldson*, 1 Kay, 711; *Scales v. M.* 453; *Collinson v. Patrick*, 2 Keen, Maude, 6 De G. M. & G. 43; *Airey v. 123; Dillon v. Coppin*, 4 M. & Cr. Hall, 3 Sm. & G. 315.

¹ *Valuable consideration.*—*Pownal v. Taylor*, 10 Leigh, 183; *Baldwin v. Humphrey*, 44 N. Y. 609; *Haskill v. Freeman*, 1 Wms. Eq. 34; *Wadsworth v. Wendell*, 5 Johns. Ch. 224; Even where a husband conveyed directly to his wife, it was held a trust; *Garner v. Garner*, 1 Busb. Eq. 1; *Livingston v. Livingston*, 2 Johns. Ch. 537; *Fellows v. Heermans*, 4 Lans. 230; *Huntly v. Huntly*, 8 Ired. Eq. 250; if the *cestui que trust* cannot be identified, the trust cannot be executed; *Ownes v. Ownes*, 8 C. E. Green, 60; *Dillaye v. Greenough*, 45 N. Y. 438; if no trustee is named in the deed, the instrument will be reformed; *Burnside v. Wayman*, 49 Mo. 356.

settlor himself contemplates some further act for the purpose of giving it completion (b).

2. **Where the settlor declares himself a trustee.**—If the settlor proposes to *convert himself* into a trustee, then the trust is *perfectly created*, and will be enforced so soon as the settlor has executed an express declaration of [*68] trust, intended to *be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable, whether it be capable or incapable of transfer (a).¹

(b) *Cotteen v. Missing*, 1 Mad. 176; *Bayley v. Boulcott*, 4 Russ. 345; *Dipple v. Corles*, 11 Hare, 183; *Jones v. Lock*, 1 L. R. Ch. App. 25; *Lister v. Hodgson*, 4 L. R. Eq. 30; *Heartley v. Nicholson*, 19 L. R. Eq. 233.

(a) *Gee v. Liddell*, 35 Beav. 621; *Morgan v. Malleson*, 10 L. R. Eq. 475; *Armstrong v. Timperon*, W. N. 1871, p. 4; *Ex parte Pye*, or *Ex parte Dubost*, 18 Ves. 140; *Thorpe v. Owen*, 5 Beav. 224; *Stapleton v. Stapleton*, 14 Sim. 186; *Vandenberg v. Palmer*, 4 Kay & J. 204; *Searle v. Law*, 15 Sim. 99; *Steele v. Waller*, 28 Beav. 466; *Paterson v. Murphy*, 11 Hare, 88; *Drosier v. Brereton*, 15 Beav. 221; *Bentley v. Mackay*, 15 Beav. 12; *Bridge v. Bridge*, 16 Beav. 315; *Gray v. Gray*, 2 Sim. N. S. 273; *Wilcocks v. Hannyngton*, 5 Ir. Ch. Rep. 38; [*Kelly v. Walsh*, 1 L. R. Ir. 275; *Re Shield*, W. N. 1884, p. 127. *Re Shield*,

has been reversed on appeal, W. N. 1885, p. 83.] In the case of *McFadden v. Jenkyns*, 1 Hare, 471; Sir J. Wigram expressed himself more cautiously than was necessary, as to the jurisdiction of the Court in enforcing a trust against the settlor himself, and suggested several accompanying circumstances as material to the establishment of such a trust. "If," he said, "the owner of property having the legal interest in himself, were to execute an instrument by which he declared himself a trustee for another, and had disclosed that instrument to the *cestui que trust*, and afterwards acted upon it, that might perhaps be sufficient; or a Court of equity, adverting to what Lord Eldon said in *Ex parte Dubost*, might not be bound to inquire further into an equitable title so established in evidence."

¹ VOLUNTARY AGREEMENTS. — *Trust not perfectly created.* — Where there is an intention merely to create a trust, and the settlor must take further action, it cannot be enforced; *Evans v. Battle*, 19 Ala. 398; *Swan v. Frick*, 34 Md. 139; *Lanterman v. Abernathy*, 47 Ill. 437; *Minturn v. Seymour*, 4 Johns. Ch. 498; *Banks v. May*, 3 A. K. Marsh, 435.

Trust perfectly created. — If nothing further remains for the settlor to do, the trust will be executed, except as against creditors and *bona fide* purchasers without notice, though there has been no change of possession; *Stone v. Hackett*, 12 Gray, 227; *Lane v. Ewing*, 31 Mo. 75; *Howard v. Bank*, 40 Vt. 597; *Padfield v. Padfield*, 68 Ill. 210; *Graham v. Lambert*, 5 Humph. 595; the transfer of certificates of stock is sufficient to pass the title; *Sherwood v. Andrews*, 2 Allen, 79; *Blaedel v. Locke*, 52 N. H. 238; *Millsbaugh v. Putnam*, 16 Abb. Pr. 380; without any change upon the corporation books; *Eames v. Wheeler*, 19 Pick. 444; *Sargent v. Ins. Co.* 8 Pick. 96; *Quiner v. Marblehead*

[3. **Gift of husband to his wife.**—Prior to the Married Women's Property Act, 1882] a husband was incapable of making a gift of chattels at law to his wife, and, therefore, if he purported to make such a gift, a Court of Equity considers it tantamount to a declaration that the husband would hold in trust for the wife for her separate use. The words

Ins. Co. 10 Mass. 476; unless a stranger is to be the trustee, and the corporate laws require it; *Lonsdale's Est. 29 Pa. St. 407*; *Kiddill v. Farnell, 8 Sm. & Gif. 428*; *Jones v. Obenchain, 10 Grat. 259*; *Gilchrist v. Stevenson, 9 Barb. 9*. It is not necessary that the beneficiary have knowledge of the settlement if he afterwards accepts and ratifies it; *Cumberland v. Codrington, 3 Johns. Ch. 281*; *Weston v. Baker, 12 Johns. 276*; *Shepherd v. M'Evers, 4 Johns. Ch. 138*; *8 Am. Dec. 561*, and see cases referring to bank deposits.

Savings-Bank Deposits.—The decisions are somewhat in conflict, owing largely to the difficulty in applying the rules to the facts of each case; where S. deposited money in trust for M. & K., distant relatives, who were ignorant of it, S. retaining the bank-book and drawing a year's interest, it was held that a valid trust was created for M. & K.; *Martin v. Funk, 75 N. Y. 134*; *31 Am. Rep. 446*; *Farrelly v. Ladd, 10 Allen, 127*; *Witzel v. Chapin, 3 Bradf. 386*; *Millsbaugh v. Putnam, 16 Abb. Pr. 380*; whether a trust has been perfectly created, or whether it is an incomplete gift, is a question of fact in all these cases, and the result reached hinges largely upon the object of the settlor, the situation of the parties, and the character of the subject-matter. In *Brabrook v. Bank, 104 Mass. 228*, a father handed his infant child a check, with a strong indication of his intention to give the check to the child, afterwards locking it up to keep it for the child. The father died the same day, and it was held there was no trust, though it appears that the decision turned rather upon the particular facts of the case than upon any variation of the principles involved; *Clark v. Clark, 108 Mass. 522*, a similar case, referred to *Brabrook v. Bank*, and was decided on the strength of that without giving any reasons; and though the facts in these cases may be thought to show that the trusts were not perfectly created, still it is submitted that they are not in accord with current of recent decisions. In view of death A. delivered to B. a package containing money, a bank-book, and a memorandum stating where he wished to be buried, and how the balance of his property was to be distributed; held a valid trust; *Pierce v. Savings Bank, 129 Mass. 425*; *37 Am. Rep. 371*; also where one took the book at direction of an aunt, who said, "Keep this, and if anything happens to me, bury me decently, put a headstone over me, pay my debts, and anything that is left is yours"; *Curtis v. Bank, 77 Me. 151*; *52 Am. Rep. 750*; *2 Schouler, Pers. Prop. § 195*; *Clough v. Clough, 117 Mass. 85*; D. deposited in bank in own name all that the law permitted, and also in names of son and grandchildren as trustee, he keeping the books and taking the dividends; evidence was admitted that D. had told them he intended the deposits for them after his death, but he wanted the interest while he lived; *Gerrish v. Inst. for Savings, 128 Mass. 159*; *35 Am. Rep. 365*; *Bartlett v. Remington, 59 N. H. 364*; *Pierson v. Drexel, 11 Abb. (N. Y.) N. Cas. 150*; *Weaver v. Emigrant Bank, 17 Abb. (N. Y.) N. Cas. 82*; *Willis v. Smyth, 91 N. Y. 297*; it must appear that the fiduciary relations are fully established; *Urann v. Coates, 109 Mass. 581*; a testator transferred certain bank shares to himself as trustee for his daughter, she being ignorant

of gift need not be in writing, or of a technical description, but must be clear, irrevocable, and complete; the unsupported testimony of the wife on her own behalf will not be sufficient, but the gift may be proved not only by witnesses at the time, but also by the husband's subsequent declaration. "If," observed Sir J. Romilly, M. R., "A. (who has £1000

of the transaction and he taking the dividend; *Cummings v. Bramhall*, 120 Mass. 552; *Powers v. Inst. for Savings*, 124 Mass. 377; also a valid trust where A. delivered a bank-book with an assignment of the deposits to E. on oral agreement that E. should pay such sums as she wanted during her life, and at death balance to son; *Davis v. Ney*, 125 Mass. 590; 28 Am. Rep. 272; *Foss v. Savings Bank*, 111 Mass. 285; *Kingman v. Perkins*, 105 Mass. 111; *Kimball v. Leland*, 110 Mass. 325; *Newton v. Fay*, 10 Allen, 505; parol is admissible to show assignment was made on certain trusts or agreements which equity will enforce; *Campbell v. Dearborn*, 109 Mass. 130; *Hunnewell v. Lane*, 11 Met. 163; a deposit was made in name of nephew N., with a memorandum that it could be paid to R., the depositor keeping the book and taking the dividends; *Northrop v. Hale*, 72 Me. 275; bank in account with A., trustee for B.; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; donor, holding book, deposited for niece; *Blasdel v. Locke*, 52 N. H. 238; *Howard v. Bank*, 40 Vt. 597; "in trust for C. F. M." raised a sufficiently clear presumption of a gift; *Mills-paugh v. Putnam*, 16 Abb. Pr. 380; *Geary v. Page*, 9 Bosw. 290; *Nutt v. Morse*, 142 Mass. 1; *Sherman v. Bank*, 138 Mass. 581; but where money was placed to credit of children, it is necessary that donor should part with the control of it; *Geary v. Page*, 9 Bosw. 290; a deposit for "E. K., M. K. guardian," depositor keeping book, but informing M. K. of it; *Kerrigan v. Rautigan*, 43 Conn. 17; *Mabie v. Bailey*, 95 N. Y. 206; there should be some evidence of delivery; *Minchin v. Merrill*, 2 Edw. Ch. 333; *Chase v. Breed*, 5 Gray, 440; sufficient delivery to pass title is inferred from slight evidence; *Moore v. Hazelton*, 9 Allen, 102; intention has much to do with delivery; *Grangiac v. Arden*, 10 Johns. 293; *Goodrich v. Walker*, 1 Johns. Cas. 251; a check is not a sufficient assignment; *Carr v. Nat'l Security Bank*, 107 Mass. 45; *Exchange Bank v. Rice*, 107 Mass. 37; *Harris v. Clark*, 3 N. Y. 93; a delivery of check payable six months after death of maker does not establish a trust; *App. Waynesburg Coll.* 111 Pa. St. 130; 56 Am. Rep. 252; *Saylor v. Bushong*, 100 Pa. St. 23; *Bank v. Millard*, 10 Wall. 152; a mere declaration of intention to make a future gift or trust is insufficient; *Gray v. Barton*, 55 N. Y. 68; *Little v. Willets*, 55 Barb. 125; *Brink v. Gould*, 43 How. Pr. 289; intestate placed two bonds in separate envelopes, and signed a memorandum that they were for sons W. and J., but he retained the income, neither son exercising any control over them; no trust created; *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; payment by bank to administrator of depositor whose account was "in trust for C. B." on production of letter of administration and pass-book, and in absence of any notice to the bank, is valid; *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83; 38 Am. Rep. 498; no trust where A. deposited money in name of B. without any declaration of trust and not in view of death, A. retaining the book; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308; *Case v. Dennison*, 9 R. I. 88; 11 Am. Rep. 222; there must be a delivery to the donee; *Hill v. Stevenson*, 63 Me. 367; 18 Am. Rep. 231; *Tilling-*

Consols standing in his name) says to B., 'I give you the £1000 Consols standing in my name,' that in my opinion would make A. a trustee for B. It would be a valid declaration of trust for B., though the stock remained in the name of A." (b).

[So where a husband by a deed poll, after reciting that he was beneficially possessed of the ground-rents thereby agreed to be settled, "settled, assigned, transferred and set over unto his wife as though she were a single woman," certain leasehold houses and the ground-rents thereof, it was held that the deed was not void as being an intended assignment, but operated as a declaration of trust (c). So where a husband by deed assigned leaseholds to his "wife, her executors, administrators, and assigns, as her separate estate," it was held that the deed operated as a valid declaration * of trust (a). But these cases have since been disap- [*69] proved of by V. C. Hall, who held that the principle laid down in *Milroy v. Lord* (b) applies equally to an imperfect gift from husband to wife as to a gift to a stranger, and that such a gift cannot be supported as a declaration of trust (c); and this view has since been adopted in Ireland (d).

(b) *Grant v. Grant*, 34 Beav. 623.
As to the general dictum of M. R. see also *Morgan v. Malleeson*, 10 L. R. Eq. 475; but see contra *Warriner v. Rogers*, 16 L. R. Eq. 349.

[(c) *Baddeley v. Baddeley*, 9 Ch. D. 113.]

[(a) *Fox v. Hawks*, 13 Ch. D. 822.]

[(b) See *post*, p. 74.]

[(c) *Re Breton's Estate*, 17 Ch. D. 416; and see *Re Whittaker*, 21 Ch. D. 657, 666.]

[(d) *Hayes v. Alliance Assurance Company*, 8 L. R. Ir. 149.]

hast v. Wheaton, 8 R. I. 536; 5 Am. Rep. 621; if one receives a gift *causa mortis* in trust, and neither the beneficiaries nor the proportions to each are clearly expressed, the trust fails; *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680; *Warner v. Bates*, 98 Mass. 274; *Hess v. Singler*, 114 Mass. 56; for other cases on the subject of deposits, see *Stone v. Bishop*, 4 Cliff. 593; *Shaw v. Hayward*, 7 Cush. 170; *Taylor v. Henry*, 48 Md. 550; *Maynard v. Maynard*, 10 Mass. 456; *Wilcox v. Matteson*, 53 Wis. 23; *Meriwether v. Morrison*, 78 Ky. 572; *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178; *Pope v. Bank*, 56 Vt. 284; 48 Am. Rep. 781.

Deed under Voluntary Settlement.—If executed in due form it will be binding on the settlor, though he retain it in his possession; *Urann v. Coates*, 109 Mass. 581; *Bunn v. Winthrop*, 1 Johns. Ch. 329; unless it appears that such was not his intention; *Otis v. Beckwith*, 49 Ill. 121. If the trust has been perfectly created, it matters not if the deed is lost, or revoked, or the property

4. Now by the recent act (*e*), sect. 1, a married woman is capable of acquiring and holding property as her separate property, as if she were a *feme sole*, without the intervention of any trustee, and a gift by a husband to his wife will now be valid, as well at law as in equity. But by sect. 10 it is provided, that nothing in the act contained shall give validity as against creditors of the husband to any gift by a husband to his wife of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband, made by or in the name of his wife in fraud of his creditors, but any moneys so deposited or invested may be followed as if the act had not been passed.

And since the act has put a gift by a husband to his wife on a similar footing to a gift to a stranger, the principles governing imperfect gifts to strangers (*f*) must be equally applied to gifts from husband to wife.]

5. **Where the property is a legal interest.** — If it be proposed to make a stranger the trustee, and the subject of the trust is a *legal interest*, and one *capable of legal transmutation*, as land or chattels which pass by conveyance, assignment, or delivery, or stock which passes by transfer, in this case the trust is not perfectly created unless the legal interest, be actually vested in the trustee. It is not enough that the settlor executed a deed affecting to pass it, and that he believed nothing to be wanting to give effect to the transaction: the intention of divesting himself of the legal property must in fact have been executed, or the Court [*70] will not recognize the trust (*g*). “I take * the distinction,” said Lord Eldon, “to be, that if you want

[(*e*) 45 & 46 Vict. c. 75; see *Re* March, 24 Ch. D. 222; 27 Ch. D. 166.]

[(*f*) See *post*, p. 74.]

(*g*) See *Garrard v. Lauderdale*, 2

revested; *Ritter's App.* 59 Pa. St. 9; *Falk v. Turner*, 101 Mass. 494; *Viney v. Abbott*, 109 Mass. 302; *Sewall v. Roberts*, 115 Mass. 272; *Meiggs v. Meiggs*, 15 Hun, 453; *Dennison v. Goehring*, 7 Barr, 175; *Aylsworth v. Whitcomb*, 12 R. I. 298; *Gilchrist v. Stevenson*, 9 Barb. 9; as to revocation, see also *Isham v. Delaware R. R. Co.* 3 Stock, 229.

The tendency in America is to favor trusts for a wife and children, but wider range of relationship would not be so favored; *Bright v. Bright*, 8 B. Mon. 194; *M'Intire v. Hughes*, 4 Bibb, 186; *Buford v. McKee*, 1 Dana, 107.

the assistance of the Court to constitute a *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting a *cestui que trust*, as upon a covenant to transfer stock, &c.; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court (a).” If, however, the settlor purport to transfer the legal estate to a trustee, but the trustee afterwards *disclaims*, the accident of the disclaimer has been held not to vitiate the deed, but the Court will appoint a new trustee (b).

6. Where the property is a legal interest incapable of legal transfer. — If the subject of the trust be a *legal interest*, but *one not capable of legal transfer*, then whether we look to principle or authority, there is considerable difficulty. On the one hand, it may be urged that in equity the universal rule is that the Court will not enforce a voluntary agreement in favour of a volunteer; and as by the supposition the legal interest remains in the settlor (who therefore at law retains the full benefit), a Court of equity will not in the absence of any consideration deprive him of that interest which he has not actually parted with. On the other hand, as the settlor *cannot* divest himself of the legal interest, to say that he shall not constitute another a trustee without passing the legal interest, would be to debar him from the creation of a trust in the hands of another at all, and the rule therefore should be that if the settlor make all the assignment of the property in his power and perfect the transaction as far as

Russ. & M. 452; Meek v. Kettlewell, 1 Hare, 469; Dillon v. Coppin, 4 M. & Cr. 647; Coningham v. Plunkett, 2 Y. & C. Ch. Ca. 245; Searle v. Law, 15 Sim. 95; Price v. Price, 14 Beav. 598; Bridge v. Bridge, 16 Beav. 315; Weale v. Ollive, 17 Beav. 252; Beech v. Keep, 18 Beav. 285; Tatham v. Vernon, 29 Beav. 604; Dillon v. Bone, 3 Giff. 238; Milroy v. Lord, 8 Jur. N. S. 806; 4 De G. F. & J. 264; Warriner v. Rogers, 16 L. R. Eq. 340; Richards v. Delbridge, 18 L. R. Eq. 11; Heartley v. Nicholson, 19 L. R. Eq.

233; Batstone v. Salter, 19 L. R. Eq. 260; 10 L. R. Ch. App. 431; [Bulbeck v. Silvester, 45 L. J. N. S. Ch. 280; West v. West, 9 L. R. Ir. 121.]

(a) Ellison v. Ellison, 6 Ves. 662; Antrobus v. Smith, 12 Ves. 39; Colman v. Sarrel, 1 Ves. jun. 50; S. C. 3 B. C. C. 12; Dening v. Ware, 22 Beav. 184; but see Airey v. Hall, 3 Sm. & Gif. 315; Kiddill v. Farnell, 3 Sm. & Gif. 428; and see Pulvertoft v. Pulvertoft, 18 Ves. 89.

(b) Jones v. Jones, W. N. 1874, p. 190.

the law permits, the Court in such a case should recognize the act, and support the validity of the trust.

Some Judges have adopted the one view of the question, and some the other (c). But in the leading case of [*71] *Kekewich v. * Manning (a)*, Lord Justice K. Bruce observed, "It is upon legal and equitable principle, we apprehend, clear that a person *sui juris* acting freely, fairly, and with sufficient knowledge, ought to have and *has it in his power* to make in a binding and effectual manner a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession or reversionary or howsoever circumstanced.*" And it is conceived that this principle will for the future prevail (b), [but since debts and legal choses in action have been made transferable at law, questions under this head will be of less frequent occurrence (c).]

Where the subject was incapable of transfer as a debt, and a parol declaration of trust was made to the *debtor*, who undertook to hold it upon those trusts, it was held to be a valid settlement without any transfer or attempt at transfer (d).

[7. Where a person wrote a letter to one of the two trustees of the settlement made on his first marriage, stating that he was desirous of making a settlement of six policies on the children of that marriage, and undertaking to make to the trustee and another trustee, to be named by the settlor, an assignment by way of settlement of the policies, *and until the settlement was executed he was to be bound by the agreement, as if the settlement were actually executed*, and afterwards he

(c) The authorities for the validity of the trust are, *Fortescue v. Barnett*, 3 M. & K. 36; *Roberts v. Lloyd*, 2 Beav. 376; *Blakely v. Brady*, 2 Drur. & Walsh, 311; *Airey v. Hall*, 3 Sm. & Gif. 315; *Parnell v. Hingston*, 3 Sm. & Gif. 337; *Pearson v. Amicable Assurance Office*, 27 Beav. 229. In favour of the opposite view, see *Edwards v. Jones*, 1 M. & Cr. 226; *Ward v. Audland*, 8 Sim. 571; *C. P. Cooper's Cases*, 1837-1838, 146; 8 Beav. 201; *Meek v. Kettlewell*, 1 Hare, 464;

Scales v. Maude, 6 De G. M. & G. 43; *Sewell v. Moxsy*, 2 Sim. N. S. 189.

(a) 1 De G. M. & G. 187, 188.

(b) See *Wilcocks v. Hannington*, 5 Ir. Ch. Rep. 45; *Penfold v. Mould*, 4 L. R. Eq. 564; [*Lee v. Magrath*, 10 L. R. Ir. 45, 318.]

[(c) *Lee v. Magrath*, 10 L. R. Ir. 313.]

(d) *Roberts v. Roberts*, 11 Jur. N. S. 992; reversed 12 Jur. N. S. 971. As to the legal transfer, see now 36 & 37 Vict. c. 66, s. 25, rule 6.

sent to the trustee another letter enclosing the former letter and three of the policies (the other three being in the possession of a mortgagee), and stating that "the enclosed was the formal letter of assignment previous to a deed, and as binding," but no notice of the letters was ever given to the offices, no formal settlement was ever executed, and no second trustee was named; it was held by V. C. Hall, that a complete assignment of the policies had been made, and that the settlement of the policies was binding and effectual (*e*). It may be doubted whether this case was rightly decided, inasmuch as the execution by the settlor of a further instrument was contemplated, and in fact necessary, in order to carry out his intention; but no new principle was intended to be introduced, and the Vice-Chancellor treated the case as falling within *Fortescue v. Burnett* and *Pearson v. Amicable Assurance Office*.]

*If a settlor assign all his personal estate with a [*72] power of attorney, the deed, being perfect and all that was intended, will pass a promissory note, notwithstanding the want of indorsement, which is required for giving it currency (*a*).

8. If the subject of the settlement be partly *incapable* of legal transfer, and partly *capable*, and that part which is capable of transfer is not transferred. In this case all has not been done that might have been done, and no trust is created. Thus where there was a mortgage in fee and the mortgagee assigned the debt with a power of attorney, but did not convey the mortgaged lands, though they were legally transferable, it was held that the settlement was incomplete (*b*).

9. 36 & 37 Vict. c. 66. — By a recent Act, 36 & 37 Vict. c. 66, s. 25, sub-sect. 6, "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) (*c*), of any *debt* or other *legal chose in ac-*

[(*e*) *Re King*, 14 Ch. D. 179.]

(*a*) *Richardson v. Richardson*, 3 L. R. Eq. 686. But see *Richards v. Delbridge*, 18 L. R. Eq. 11.

(*b*) *Woodford v. Charnley*, 28 Beav.

[(*c*) As to what amounts to such an assignment, see *National Provincial Bank v. Harle*, 6 Q. B. D. 626; *Burlinson v. Hall*, 12 Q. B. D. 347.]

tion,¹ of which express notice in writing shall have been given to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if that Act had not passed) to pass, and transfer the *legal* right to such debt or chose in action from the date of such notice (d).” [The notice may be given at any time, even after the death of the assignor; but the effect of delaying to give notice will be to let in any equities arising in the interval before the notice is given (e).]

10. **Where the property is an equitable interest.**—If the subject of the trust be an *equitable* interest, then on the

[(d) Under the corresponding section in the Irish Act, 40 & 41 Vict. c. 57, s. 28, sub-s. 6, it was held that the volunteer assignee of a promissory note, not negotiable, and not payable at the time of the indorsement, was

within the Act. *Lee v. Magrath*, 10 L. R. Ir. 45; reversed on other grounds, 10 L. R. Ir. 313.]

[(e) *Walker v. Bradford Old Bank*, 12 Q. B. D. 511.]

¹ In a very recent case, Lord Justice Cotton considered what was the origin of the term *chose in action*: “I shall not go very far back in considering what was the origin of the term *chose in action*. It is sufficient in my opinion to go as far back as Blackstone. After having dealt with personal property in possession, he goes on thus: ‘Having thus considered the several divisions of property in possession, which subsists there only where a man hath both the right and also the occupation of the thing, we will proceed next to take a short view of the nature of property in action, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or *chose in action*.’ Comm. vol. II, p. 39. I may also refer to what was said, to my mind in rather plainer terms, by Mr. Joshua Williams in his book on Personal Property, 12th ed., p. 4, where he says: ‘Although there was formerly no such thing as an incorporeal chattel personal, there existed not unfrequently a right of action, or the liberty of proceeding in the Courts of law either to recover pecuniary damages for the infliction of a wrong, or the non-performance of a contract, or else to procure the payment of money due. Such a right was called, in the Norman-French of our early lawyers, a *chose* or thing in action, whilst movable goods were denominated *choses in action*. Originally those *choses in action*, except in the case of *choses in action* of the Crown, could not be assigned, and they were not considered really to be property.’” *Colonial Bank v. Whinney*, 30 Ch. Div. at pp. 275, 276. In this case it was decided that shares in a company incorporated under a statute with power to transfer, so as to vest the shares at law in the person standing on the register, are not *choses in action*. Cotton and Lindley, L. JJ., *dissentiente* Fry, L. J.

authority of *Sloane v. Cadogan* (*f*) a valid trust is created when the settlor has executed an assignment of it to a new trustee; for an equitable interest is capable of transmission from one to another; and here the Court finds the relation of trustee and *cestui que trust* *established [*73] without the necessity of calling on the settlor to join in any act for giving it completion.

The late Vice-Chancellor of England questioned the case of *Sloane v. Cadogan* upon this point (*a*); but in *Kekewich v. Manning* (*b*), Lord Justice K. Bruce observed, "Suppose stock or money be legally vested in A. as a trustee for B. for life, and subject to B.'s life interest for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D.?"

These principles have since been acted upon (*c*), and *Sloane v. Cadogan* may be regarded as law. It had been before contended that the assignment operated by way of *contract*, and as there was no consideration the Court could not enforce it; but the rule now is, that the assignment passes the equitable *estate* (*d*).

11. **Where new trust is created without new trustees.**—In other cases a person entitled to an equitable interest, instead of assigning it to new trustees, has directed the old trustees

(*f*) Appendix to *Sug. Vend. & Purch. Quære*, also, if the same point was not ruled in *Ellison v. Ellison*, 6 Ves. 656; for though the facts are very imperfectly stated, it would seem from some expressions that at the date of the settlement the legal estate was not in the settlor; and see *Reed v. O'Brien*, 7 Beav. 32; *Bridge v. Bridge*, 16 Beav. 315; *Gannon v. White*, 2 Ir. Eq. Rep. 207.

(*a*) *Beatson v. Beatson*, 12 Sim. 281.

(*b*) 1 De G. M. & G. p. 188.

(*c*) *Voyle v. Hughes*, 2 Sm. & Gif.

18; *Lambe v. Orton*, 1 Dr. & Sm. 125; *Gilbert v. Overton*, 2 H. & M. 110; *Woodford v. Charnley*, 28 Beav. 99, per M. R.; *Re Way's Trust*, 2 De G. J. & S. 365; reversing same case, 4 New Rep. 453.

(*d*) *Donaldson v. Donaldson*, 1 Kay, 711. "If," Sir J. Wigram on one occasion observed, "the equitable owner of property, the legal interest of which is in a trustee, should execute a voluntary assignment, and authorise the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof

to stand possessed of it upon the new trusts (*e*), and, of course, it has been considered quite immaterial whether the settlor selected new trustees or was content with the original trustees.

12. **Assignment to a stranger for his own benefit.**—In other cases the owner of an equitable interest has simply assigned it to a stranger for the stranger's own benefit (*f*), which also in principle is the same as *Sloane v. Cadogan*, for there can be no difference between the gift of an equitable interest to A. himself and the gift of it to B. in trust for A.

[*74] *13. **Case of particular mode intended, but not effectual.**—If the settlor intend to make the settlement in one particular mode, but which fails, the Court will not go out of its way to give effect to it by applying another mode; as if the settlement be intended to be made by transfer of the legal estate, the Court will not hold such intended but effectual transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust (*a*).

14. **Meek v. Kettlewell.**—In a case (*b*) heard before Sir J. Wigram, and affirmed by Lord Lyndhurst (*c*), it was held that a voluntary assignment of a mere *expectancy* (as of an heir or next of kin) in an equitable interest, and *not commu-*

to the trustee, and the trustee should accept the notice and act upon it, by paying the interest and dividends of the trust property to the assignee during the life of the assignor, and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity," 1 Hare, 471. The Vice-Chancellor here enumerates all the safeguards and confirmatory acts of which the transaction was capable, but it must not be inferred that if some of these were wanting, the trust would not be supported.

(*e*) *Rycroft v. Christy*, 3 Beav. 238; *M'Fadden v. Jenkyns*, 1 Hare, 458; 1 Phill. 153; *Lamb v. Orton*, 1 Dr. & Sm. 125.

(*f*) *Cotteen v. Missing*, 1 Mad. 176; *Collinson v. Patrick*, 2 Keen, 123; *Wilcocks v. Hannington*, 5 Ir. Ch. Rep. 38; and see *Godsall v. Webb*, 2 Keen, 99.

(*a*) *Milroy v. Lord*, 8 Jur. N. S. 809; 4 De G. F. & J. 274, per L. J. Turner; *Richards v. Delbridge*, 18 L. R. Eq. 11; *Heartley v. Nicholson*, 19 L. R. Eq. 233; [*Bottle v. Knockner*, 46 L. J. N. S. Ch. 159; *Cross v. Cross*, 1 L. R. Ir. 389; 3 L. R. Ir. 342; *Hayes v. Alliance Assurance Co.* 8 L. R. Ir. 149; *West v. West*, 9 L. R. Ir. 121; *Lee v. Magrath*, 10 L. R. Ir. 313.]

(*b*) *Meek v. Kettlewell*, 1 Hare, 464. See observations upon this case in *Penfold v. Mould*, 4 L. R. Eq. 564.

(*c*) 1 Ph. 342.

nicated to the trustees, did not amount to the creation of a trust. This was the only point decided, and perhaps a distinction may be said to exist between the settlement of an *actual interest* and an *expectancy*, for a trust to be enforced must be *perfectly created*, whereas any dealing with what a person *has not*, but only *expects to have*, must necessarily in some sense be *in fieri*. However, Sir J. Wigram, in the course of his judgment, denied that any distinction existed between settlements of a *legal* interest, as in *Edwards v. Jones*, and of an *equitable* interest, as in *Sloane v. Cadogan*, two cases which, both on principle and authority, ought not to be confounded.

15. **Notice unnecessary.**—Great importance was also attached by his Honour to the circumstance that *notice of the assignment* was not given to the trustees. But notice in these cases is not indispensable. As against the *settlor*, an equitable interest is perfectly transferred without notice. It is only as between *purchasers* that the service of notice on the trustee, or the want of it, has a material effect upon the transfer (*d*).

16. **Settlement retained in settlor's possession.**—If a person execute a voluntary *settlement*, which is duly sealed and delivered at the time, but the settlor keeps it in his possession and never parts with it, the settlement is nevertheless * as binding as if it had been handed over to the parties entitled (*a*). But in the case of a conveyance upon a *sale*, though the deed be duly sealed and delivered, and the word “*escrow*” be not used, yet if it be retained in the hands of the vendor's solicitor it has no operation until handed over to the purchaser on payment of the purchase-money (*b*). The distinction is that in the former case noth-

(*d*) See *Burn v. Carvalho*, 4 M. & Cr. 690; *Donaldson v. Donaldson*, Kay, 711; *Sloper v. Cottrell*, 6 Ell. & Bl. 504; *Gilbert v. Overton*, 2 H. & M. 110. Lord Romilly had attached importance to notice, even as against the settlor. See *Bridge v. Bridge*, 16 Beav. 315; *Re Way's Trust*, 4 New Rep. 453, but this view has been over-

ruled, see *Re Way's Trust*, 2 De G. J. & S. 365.

(*a*) *Re Way's Trust*, 2 De G. J. & S. 365; *Fletcher v. Fletcher*, 4 Hare, 67; *Hope v. Harman*, 11 Jur. 1097; *Armstrong v. Timperon*, 19 W. R. 558; 24 L. T. N. S. 275; and see *Jones v. Jones*, 23 W. R. 1.

(*b*) *Hudson v. Temple*, 29 Beav.

ing remains to be done, but in the latter case the substance of the agreement on one side, viz. the payment of the purchase-money, is still to be performed.

17. Where donee incurs expense in respect of the property.

— Though a settlement be voluntary at the time, and the legal estate do not pass, yet if the donee with the knowledge and sanction of the donor incur expense in respect of the property upon the faith of the gift, the donee is no longer regarded as a volunteer, but, in the character of purchaser, may call for a conveyance of the legal estate (*c*).

18. Voluntary settlement by way of trust not revocable by settlor. — If a complete voluntary settlement, whether with or without transmutation of possession, be once executed, it cannot be revoked by a subsequent *voluntary* settlement (*d*), and the circumstance that the legal estate which was vested in the trustee becomes afterwards by some accident re-vested in the settlor is immaterial, as he will take it as a trustee (*e*). But if the voluntary settlement be in trust for the settlor for life, and then in trust for others, but subject to such debts as the settlor may leave, the settlor may in effect nullify the settlement by creating new debts (*f*).

19. Fraud. — A voluntary settlement, though complete on the face of it, may be set aside in equity, where obtained by undue influence (*g*), or where it was not intended to take effect in the events which have actually happened, and was therefore executed under a mistake (*h*).

20. But in case of lands may be defeated by a sale. — A *voluntary settlement of land* by way of trust, perfectly created, is liable, under 27 Eliz. cap. 4, like a settlement of the legal estate, to be defeated by a subsequent *sale* to a *purchaser*, even with notice (*i*). And the *cestui que trust* can neither

545, *per* M. R.; *Murray v. Stair*, 2 Barn. & Cr. 82; *Nash v. Flynn*, 1 Jon. & Lat. 162.

(*c*) *Dillwyn v. Llewelyn*, 4 De G. F. & J. 517.

(*d*) *Newton v. Askew*, 11 Beav. 145; *Rycroft v. Christy*, 3 Beav. 238.

(*e*) *Ellison v. Ellison*, 6 Ves. 656; *Smith v. Lyne*, 2 Y. & C. 345; *Pater-son v. Murphy*, 11 Hare, 88.

(*f*) *Markwell v. Markwell*, 34 Beav. 12.

(*g*) *Huguenin v. Baseley*, 14 Ves. 273.

(*h*) See *Forshaw v. Welsby*, 30 Beav. 243; *Nanney v. Williams*, 22 Beav. 452; *Bindley v. Mulloney*, 7 L. R. Eq. 343.

[*i*] In *Price v. Jenkins*, 5 Ch. Div. 619, it was held that a settlement of

obtain *an injunction against the sale, though the [*76] settlement was founded on meritorious consideration, as a provision for a wife or child (*a*), nor follow the estate into the hands of the purchaser (*b*), nor charge him with misapplication of the purchase-money, if, with notice of the voluntary settlement, he paid it to the vendor (*c*), nor can come upon the settlor himself to compensate the *cestui que trust* for the loss (*d*). However, the settlement must be purely voluntary, and not founded on valuable consideration at all (for the Court does not look at the *quantum* of consideration) (*e*); and where the settlement is purely voluntary the trust will be executed by the Court until the estate is actually sold (*f*); and the author of the settlement,

leaseholds by assignment was not voluntary, although the deed contained no covenant by the trustees to pay the rent or perform the covenants of the lease under which the premises were held, on the ground that the trustees came under a responsibility for payment of rent and performance of the covenants, which might be such a responsibility, that a lessee might be actually willing to pay money to get rid of. This case arose under 27 Eliz. cap. 5; but the doctrine laid down in it has no application to cases arising under 13 Eliz. cap. 5; *Re Riller*, 22 Ch. D. 74; and see *Ex parte Hillman*, 10 Ch. D. 622; *Re Marsh and Earl Granville*, 24 Ch. D. 11. The Irish case of *Gardiner v. Gardiner*, 12 Ir. C. L. R. 565, in which it was held that even a covenant by the assignee of a leasehold interest to indemnify the lessee against the rent and covenants in the lease was not necessarily such a valuable consideration as to take the case out of the Statute of Fraudulent Conveyances, 10 Car. 1, S. 2, c. 3, was not noted in *Price v. Jenkins*, and the question whether the principle of *Gardiner v. Gardiner* or *Price v. Jenkins* was to prevail, was treated as an open one in Ireland in *Hamilton v. Molloy*, 5 L. R. Ir. 339; and in a subsequent case in the Irish Court of Appeal,

Price v. Jenkins has been dissented from, and *Gardiner v. Gardiner* followed; see *Lee v. Mathews*, 6 L. R. Ir. 530, overruling S. C. 6 L. R. Ir. 167; and see *Re Lulham*, 53 L. J. N. S. Ch. 928; 32 W. R. 1013, in which case *Kay, J.* followed *Price v. Jenkins* against his own opinion.]

(*a*) *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

(*b*) *Williamson v. Codrington*, 1 Ves. 516, *per* Lord Hardwicke.

(*c*) *Evelyn v. Templar*, 2 B. C. C. 148; and see *Pulvertoft v. Pulvertoft*, 18 Ves. 91, 93; *Buckle v. Mitchell*, 18 Ves. 112; but compare *Leach v. Dean*, 1 Ch. Rep. 146, with *Pulvertoft v. Pulvertoft*, 18 Ves. 91; and see 18 Ves. 92, note (*b*), and *Townend v. Toker*, 1 L. R. Ch. App. 447.

(*d*) *Williamson v. Codrington*, 1 Ves. 516, *per* Lord Hardwicke; but see *Leach v. Dean*, 1 Ch. Rep. 146; S. C. cited *Pulvertoft v. Pulvertoft*, 18 Ves. 91.

(*e*) *Townend v. Toker*, 1 L. R. Ch. App. 447; *Bagspoole v. Collins*, 6 L. R. Ch. App. 228; [*Shurmur v. Sedgwick*, 24 Ch. Div. 597; see *Paget v. Paget*, 9 L. R. Ir. 128; *Reversed*, 11 L. R. Ir. 26.]

(*f*) *Pulvertoft v. Pulvertoft*, 18 Ves. 94.

if he contract for the sale, cannot himself take proceedings to enforce specific performance (*g*) though the purchaser may do so (*h*), and though the settlor himself may defeat the trust by a subsequent sale, the *heir* or *devisee* of the settlor has no such power (*i*); [and where a voluntary [*77] settlement is made of land *subject to an existing mortgage, and the property is sold by the mortgagee under his power of sale, the settlement is not thereby defeated as to the surplus proceeds of sale after satisfying the mortgage (*a*).] But chattels *personal* (in which respect they differ from chattels *real*) (*b*) are not within the statute 27 Eliz. c. 4, relating to *purchasers*, and therefore a voluntary settlement of chattels personal cannot be defeated by a subsequent sale (*c*). But voluntary deeds may acquire a validity by matter *ex post facto*, as by a sale or mortgage by the volunteer on the footing of the voluntary deed, and this doctrine has been extended to the disposition for valuable consideration of an equitable interest (*d*).

21. 13 Eliz. c. 5. — A voluntary settlement, whether of real or personal estate, may be defeated by the operation of 13 Eliz. c. 5, which makes void all instruments by which *creditors* “are or shall be in any way disturbed, hindered, delayed, or defrauded,” but such instruments as are made on “good consideration and *bona fide*” are excepted.

Deeds invalid as against creditors. — Upon the construction of this statute it has been held, that where the settlor was

(*g*) *Johnson v. Legard*, Turn. & Russ. 294; *Smith v. Garland*, 2 Mer. 123; but see *Hogarth v. Phillips*, 4 Drew. 300; *Peter v. Nicolls*, 11 L. R. Eq. 391.

(*h*) *Willats v. Busby*, 5 Beav. 193; *Daking v. Whimper*, 26 Beav. 568; *Townend v. Toker*, 1 L. R. Ch. App. 447. But he cannot file a bill to have the voluntary deed delivered up, *Hoghton v. Money*, 35 Beav. 98; S. C. 1 L. R. Eq. 154.

(*i*) *Doe v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132.

[(*a*) *Re Walhampton Estate*, 26 Ch. D. 391.]

(*b*) *Saunders v. Dehew*, 2 Vern. 272, second note.

(*c*) *Bill v. Cureton*, 2 M. & K. 503; *M'Donell v. Hesilrige*, 16 Beav. 346; *Jones v. Croucher*, 1 Sim. & Stu. 315 (this case cites also the authority of Sir W. Grant in *Sloane v. Cadogan*, Append. to Sugd. Vend. & Purch., but the *dictum* does not appear); *Meek v. Kettlewell*, 1 Hare, 473, *per* Sir J. Wigram.

(*d*) *George v. Milbanke*, 9 Ves. 190; and see 1 Mer. 638; 7 Cl. & Fin. 463.

insolvent at the time (*e*), or substantially indebted (*f*), or the object of defeating creditors may be inferred from a person settling his whole property, real and personal, and so depriving himself of the means of paying an existing debt (*g*), a voluntary deed, though supported by the meritorious consideration of providing for a wife or child (*h*), and though made in pursuance of a *verbal* ante-nuptial promise (*i*), and though it was a settlement of the purchase-money, or of an annuity in lieu of * purchase- [78] money upon a sale (*a*), is fraudulent as against creditors, (though only general creditors without any lien (*b*), or creditors under a voluntary post obit bond (*c*)). But a deed is not impeachable merely because it comprises the whole of a person's property (*d*), or merely because it is voluntary (*e*), and although it be upon the face of it voluntary, it may be shewn by extrinsic evidence to have been founded on valuable consideration (*f*), or to have been otherwise *bond fide* (*g*). And on the other hand, a deed, though it was founded on *valuable consideration*, even in consideration of marriage (*h*), may, if it was executed for the purpose of *defrauding* creditors, be declared to be void (*i*).

(*e*) *Barrack v. McCulloch*, 3 K. & J. 110; *Lush v. Wilkinson*, 5 Ves. 384; *Whittington v. Jennings*, 6 Sim. 493; *French v. French*, 6 De G. M. & G. 95; *Acraman v. Corbett*, 1 J. & H. 410; *Crossley v. Elworthy*, 12 L. R. Eq. 158; *Taylor v. Coenen*, 1 Ch. Div. 636.

(*f*) *Townsend v. Westacott*, 2 Beav. 340; 4 Beav. 58; *Martyn v. Macnamara*, 2 Conn. & Laws. 554, *per Cur.*; *Holmes v. Penney*, 3 K. & J. 99; *Cornish v. Clark*, 14 L. R. Eq. 184; and see *Richardson v. Smallwood*, Jac. 557; *Skarf v. Soulby*, 1 Mac. & G. 375.

(*g*) *Smith v. Cherrill*, 4 L. R. Eq. 390; and see *Spirett v. Willows*, 3 De G. J. & S. 303.

(*h*) *Barrack v. McCulloch*, 3 Kay & J. 110; and see *Lush v. Wilkinson*, 5 Ves. 384.

(*i*) *Crossley v. Elworthy*, 12 L. R. Eq. 158.

(*a*) *French v. French*, 6 De G. M. & G. 95; *Neale v. Day*, 4. Jur. N. S. 1225.

(*b*) *Reese River Company v. Atwell*, 7 L. R. Eq. 347.

(*c*) *Adames v. Hallett*, 6 L. R. Eq. 468.

(*d*) *Alton v. Harrison*, 4 L. R. Ch. App. 622; *Allen v. Bonnett*, 5 L. R. Ch. App. 577; [*Ex parte Games*, 12 Ch. D. 314.]

(*e*) *Holloway v. Millard*, 1 Mad. 414; *Thompson v. Webster*, 4 Drew. 632; *Holmes v. Penney*, 3 K. & J. 90.

(*f*) *Gale v. Williamson*, 8 M. & W. 540.

(*g*) *Thompson v. Webster*, 4 Drew. 628; 4 De G. & J. 600.

(*h*) *Bulmer v. Hunter*, 8 L. R. Eq. 46; *Colombine v. Penhall*, 1 Sm. & G. 228.

(*i*) *Twyne's case*, 3 Rep. 80, a; *Bott v. Smith*, 21 Beav. 511; *Acra-*

22. **Valid deeds.**— If the settlor was *solvent* at the time (*j*), or was indebted only in the ordinary course as for current expenses which he had the means of paying (*k*), or not substantially indebted (*l*), or in a sum of considerable amount but adequately secured by mortgage (*m*), or which the settlor's other property was amply sufficient to meet (*n*), and the settlement was *bond fide*, the deed cannot be impeached. The indebtedness of the party at the time is only one circumstance of evidence upon the question of *fraud*, and under all the circumstances the Court may see that no fraud was intended or can be presumed (*o*). On the other hand though the settlor was perfectly solvent at the time, yet if he executed the settlement with a view of withdrawing the bulk of his property from the reach of his creditors in the event of insolvency, which is in his contemplation, as when a person about to embark in a hazardous business

[*79] *makes a settlement on his wife and family to guard against the consequences, the settlement is void (*a*).

23. **What creditors can set aside the deed.**— If it can be proved that the settlor contemplated, in fact, a fraud upon *subsequent* creditors, the deed can no doubt be set aside at their instance, though the settlor was not indebted at the date of the deed, or the debts which did exist have since been paid (*b*). But where fraud is merely *presumed* from

man v. Corbett, 1 J. & H. 410; Hol-
lamby v. Oldrieve, W. N. 1866, p. 94;
and see Harman v. Richards, 10 Hare,
81; Holmes v. Penney, 3 K. & J. 90.

(*j*) Lush v. Wilkinson, 4 Vet. 384;
Battersby v. Farrington, 1 Swans. 106;
Kent v. Riley, 14 L. R. Eq. 190;
Middlecome v. Marlow, 2 Atk. 519;
Townshend v. Windham, 2 Ves. 11,
per Lord Hardwicke; Russel v. Ham-
mond, 1 Atk. 15; Walker v. Burrows,
1 Atk. 94; and see Martyn v. Macna-
mara, 2 Conn. & Laws. 554.

(*k*) Skarf v. Soulby, 1 Mac. & G.
375, *per Cur.*; Lush v. Wilkinson, 5
Ves. 387, *per Cur.*

(*l*) Graham v. O'Keefe, 16 Ir. Ch.
Rep. 1.

(*m*) Stephens v. Olive, 2 B. C. C.
90; and see Skarf v. Soulby, 1 Mac.
& G. 375.

(*n*) Kent v. Riley, 14 L. R. Eq. 190.

(*o*) Richardson v. Smallwood, Ja-
cob, 556; [*Re* Johnson, 20 Ch. D.
389; affirmed *nom.* Golden v. Gillam,
51 L. J. N. S. Ch. 503.]

(*a*) Mackay v. Douglass, 14 L. R.
Eq. 106; [*Ex parte* Russell, 19 Ch. D.
588; *Re* Ridler, 22 Ch. D. 74.]

(*b*) Barling v. Bishopp, 29 Beav.
417; Jenkyn v. Vaughan, 3 Drew.
426; Richardson v. Smallwood, Jac.
556; Tarbuck v. Marbury, 2 Vern.
510; Hungerford v. Earle, Ib. 261;
Spirett v. Willows, 3 De G. J. & S.
303; Ware v. Gardner, 7 L. R. Eq.

the want of consideration and the indebtedness of the party, the settlement is deemed fraudulent only as against those creditors who were such at the date of the settlement (*c*); and if those creditors have since been satisfied, the intention of defrauding them is rebutted (*d*). But when the deed has once been set aside as fraudulent against a creditor who was such at the time, other subsequent creditors are allowed to come in *pro ratâ* (*e*): and as subsequent creditors have this equity, they may themselves, though this was formerly doubted (*f*), institute proceedings to set aside the deed, so long as any debt incurred at the date of the deed remains unsatisfied (*g*); and where the subsequent creditor proves such a debt to be still in existence, but does not show the insolvency or substantial indebtedness of the settlor at the date of the deed, the Court in its discretion may direct an inquiry (*h*).

[The mere abstaining from suing for a period less than that required to raise a bar under the Statute of Limitations, as for ten years, will not prevent the creditors from setting aside the deed (*i*).]

24. Whether settlements of stock, &c., within 13 Eliz. c. 5.

— It was formerly held that settlements of stock, policies of insurance, &c., which were not liable to be taken in execution at the suit of a creditor, were exempt from the operation of the Act, * and therefore that settle- [*80]

317; *Freeman v. Pope*, 9 L. R. Eq. 206; 5 L. R. Ch. App. 538.

(*c*) *Kidney v. Ceussmaker*, 12 Ves. 136; *Montague v. Sandwich*, cited *ib.*; *White v. Sanson*, 3 Atk. 410; *Lush v. Wilkinson*, 5 Ves. 384; *Townsend v. Westacott*, 2 Beav. 340; 4 Beav. 58; and see *Whittington v. Jennings*, 6 Sim. 493; *Spirett v. Willows*, 3 De G. J. & S. 293.

(*d*) See *Jenkins v. Vaughan*, 3 Drew. 425; *Richardson v. Smallwood*, Jac. 557.

(*e*) *Richardson v. Smallwood*, Jac. 558; *Montague v. Sandwich*, cited 12 Ves. 156, note (*a*); *Jenkyn v. Vaughan*, 3 Drew. 424; *Taylor v. Jones*, 2 Atk. 200.

(*f*) See *Ede v. Knowles*, 2 Y. & C. C. 178.

(*g*) *Jenkyn v. Vaughan*, 3 Drew. 419; *Freeman v. Pope*, 9 L. R. Eq. 206; 5 L. R. Ch. App. 538; and see *Lush v. Wilkinson*, 5 Ves. 387; *Richardson v. Smallwood*, Jac. 552.

(*h*) *Richardson v. Smallwood*, Jac. 557; *Jenkyn v. Vaughan*, 3 Drew. 427; *Townsend v. Westacott*, 2 Beav. 345; *Skarf v. Soulby*, 1 Mac. & G. 364; *Christy v. Courtenay*, 13 Beav. 101.

[(*i*) *The Three Towns Banking Company v. Maddever*, 52 L. J. N. S. Ch. 733; affirmed *W. N.* 1884, p. 178.]

ments of them could not be defeated (a). But now that by 1 & 2 Vict. c. 110, such interests are liable to execution, or to be charged by a judge's order, the distinction must be considered as obsolete (b).

[25. **Bankruptcy.**— Under the Bankruptcy Act, 1883 (c), a *fraudulent* conveyance of a person's property, or any part thereof, is an act of bankruptcy, as also is any conveyance of property which would be void as a fraudulent preference, and a voluntary settlement is void as against the trustee in Bankruptcy if the settlor become bankrupt within *two years*; and if the settlor become bankrupt within *ten years* it is void, unless it can be shown that he was solvent at the time without the aid of the property comprised in the settlement, and that the interest of the settlor in the settled property passed to the trustee of the settlement on the execution thereof.

26. **Settlement of future property on marriage.**— Under the Bankruptcy Act, 1883 (d), a covenant or contract made in consideration of marriage for the future settlement on the settlor's wife or children of any property wherein he had not at the date of the marriage any estate or interest, and not being property of the wife, is on his becoming bankrupt before the property is actually transferred pursuant to the covenant or contract, void against the trustee in the bankruptcy.]

27. **Whether a Court of equity will enforce specific performance of agreements under seal where there is no valuable consideration.**— As every *agreement under hand and seal* carries a consideration upon the face of it, and will support an action at law, the inference has not unfrequently been drawn, that equity in such a case, though the trust was not perfectly created, will specifically execute the contract in favour of volunteers (e). But equity never enforced a covenant to stand seised to the *use of a stranger in blood*; and, if we examine

(a) *Grogan v. Cooke*, 2 B. & B. 230; *Cochrane v. Chambers*, Amb. 79, note 1; *Rider v. Kidder*, 10 Ves. 368; *Dundas v. Dutens*, 2 Cox, 235; 1 Ves. J. 196.

(b) *Norcutt v. Dodd*, Cr. & Ph. 100; *Sims v. Thomas*, 12 A. & E.

536; *Barrack v. McCulloch*, 3 K. & J. 110.

[(c) 46 & 47 Vict. c. 52, ss. 4 & 47.] See *Ex parte Dawson*, 19 L. R. Eq. 433.

[(d) 46 & 47 Vict. c. 52, s. 47.]

(e) See *Wiseman v. Roper*, 1 Ch.

the authorities, we shall find there is very little ground in support of the position; and it is now well settled, that a voluntary covenant, notwithstanding the solemnity of the seal, will *not* be specifically executed (*f*).

* 28. *Meritorious consideration*. — It has also been [*81] sometimes supposed that where the trust is imperfectly created, yet the Court, without proof of *valuable* consideration, will act upon *meritorious* consideration, as payment of debts, or provision for a wife or child (*a*).

Re. 158; *Beard v. Nutthall*, 1 Vern. 427; *Husband v. Pollard*, cited *Randal v. Randal*, 2 P. W. 467; *Vernon v. Vernon*, 2 P. W. 594; *Goring v. Nash*, 3 Atk. 186, 2d ground; *S. C.* cited 1 Ves. 513; *Stephens v. Trueman*, 1 Ves. 73; and see *Williamson v. Codrington*, 1 Ves. 511; *Hervey v. Audland*, 14 Sim. 531.

(*f*) *Hale v. Lamb*, 2 Eden. 204, *per* Lord Northington; *Fursaker v. Robinson*, Pr. Ch. 475; *Evelyn v. Templar*, 2 B. C. C. 148; *Coleman Sarel*, 3 B. C. C. 12; *Jefferys v. Jefferys*, Cr. & Ph. 188; *Meek v. Kettlewell*, 1 Hare, 474, *per* Sir J. Wigram; *Fletcher v. Fletcher*, 4 Hare, 74; *per eundem*; *Newton v. Askew*, 11 Beav. 145; *Dillon v. Coppin*, 4 M. & Cr. 647; *Kekewich v. Manning*, 1 De G. M. & G. 188; *Denning v. Ware*, 22 Beav. 134.

But a voluntary covenant to pay a sum to A. in trust for B. has been allowed to create a debt in favour of B. *Fletcher v. Fletcher*, 4 Hare, 67; *Ward v. Audland*, 16 M. & W. 862; *Cox v. Barnard*, 8 Hare, 310; *Williamson v. Codrington*, 1 Ves. 511; and see *Bridge v. Bridge*, 16 Beav. 320. But as the ground of this is, that the covenant is perfect at law and the covenantee could recover upon it, it seems to follow that where only nominal damages would be given at law, a Court of Equity would not give more.

A voluntary bond or covenant creates a debt, which will be paid before legatees, and even at the expense of

specific legatees, *Patch v. Shore*, 2 Drew. & Sm. 589; though after creditors for value, *Watson v. Parker*, 8 Beav. 288; *Denning v. Ware*, 22 Beav. 188; *Hales v. Cox*, 32 Beav. 118; and before interest allowed by the general orders of the Court on debts not carrying interest, *Garrard v. Dinorben*, 5 Hare, 213.

And the same principle has been applied to a voluntary promissory note, *Dawson v. Kearton*, 3 Sm. & Gif. 191. But though a voluntary promissory note can, if circulated, be recovered upon at law by a *bond fide* holder, yet it is conceived that the original payee cannot recover if the maker prove want of consideration; and if this be so, then, as equity follows the law, this debt should not be allowed in equity; see *Vez v. Emery*, 5 Ves. 541; *Hill v. Wilson*, 8 L. R. Ch. App. 901; *Curteis v. Adams*, W. N. 1875, p. 53. In one case a person gave his promissory note to a trustee, for the settlor's natural daughter, and deposited the title deeds of an estate in the hands of the trustee to secure the debt, and the M. R. held that a valid trust had been created of the amount. *Arthur v. Clarkson*, 35 Beav. 458.

A bond or covenant which is voluntary at first, may acquire support from valuable consideration by matter *ex post facto*. *Payne v. Mortimer*, 1 Giff. 118; 4 De G. & J. 447.

(*a*) A child may plead meritorious consideration as against the parent, but of course a parent cannot plead

29. Agreement founded thereon not enforced against the settlor. — After much conflict of authority (*b*), it may now be considered as settled that an agreement founded on meritorious consideration will not be executed as against the settlor himself (*c*).

30. How far enforced as against parties claiming under him. — As regards parties claiming under the settlor, it was always admitted, that had the settlor sold the estate or become indebted, the equity of the *cestui que trust* claiming on the ground of meritorious consideration, would not [*82] bind a purchaser or creditors (*d*). * But if he subsequently made a voluntary settlement, or died without disposing of the estate by act *inter vivos*, then the old cases were that the equity would attach as against the volunteers under the settlement (*a*), a devisee or legatee (*b*), the heir-at-law or next of kin (*c*), with however the saving clause, that the Court would not have enforced it even as against these classes of persons, where they too could plead meritorious consideration (as if they were the children of the settlor), without a previous inquiry by the Master, whether they had any adequate provision independently of the estate (*d*). At the present day, however, it is conceived that even as against volunteers claiming under the settlor, with or without an adequate provision, a voluntary agreement, whether

it as against the child. *Downing v. Townsend*, Amb. 592.

(*b*) See *Bonham v. Newcomb*, 2 Vent. 365; *Leech v. Leech*, 1 Ch. Ca. 249; *Fothergill v. Fothergill*, Freem. 256; *Sear v. Ashwell*, cited *Gordon v. Gordon*, 3 Swans. 411, note; *Watts v. Bullas*, 1 P. W. 60; *Bolton v. Bolton*, Serjt. Hill's MSS. 77; S. C. 3 Sw. 414, note; *Goring v. Nash*, 3 Atk. 186; *Darley v. Darley*, 3 Atk. 399; *Hale v. Lamb*, 2 Eden. 292; *Evelyn v. Templar*, 2 B. C. C. 148; *Coleman v. Sarrell*, 1 Ves. jun. 50; S. C. 3 B. C. C. 12; *Antrobus v. Smith*, 12 Ves. 39; *Rodgers v. Marshall*, 17 Ves. 294; *Ellis v. Nimmo*, Ll. & G. t. Sugd. 333. The subject will be found discussed at length in 3d edit. p. 95.

(*c*) *Antrobus v. Smith*, 12 Ves. 46; *Holloway v. Headington*, 8 Sim. 325; *Walrond v. Walrond*, Johns. 25.

(*d*) *Bolton v. Bolton*, 3 Serjt. Hill's MSS. 77; S. C. 3 Sw. 414, note; *Goring v. Nash*, 3 Atk. 186; *Finch v. Earl of Winchelsea*, 1 P. W. 277; and see *Garrard v. Lauderdale*, 2 R. & M. 453, 454.

(*a*) *Bolton v. Bolton*, *ubi supra*.

(*b*) *Ib*.

(*c*) *Watts v. Bullas*, 1 P. W. 60; *Goring v. Nash*, 3 Atk. 186; *Rodgers v. Marshall*, 17 Ves. 294.

(*d*) See *Goring v. Nash*, *Rodgers v. Marshall*, *ubi supra*.

under seal or not, cannot be enforced on the mere ground of meritorious consideration (*e*).

31. **No trust unless there be an intention to create one.** — It is obviously essential to the creation of a trust, that there should be the *intention* of creating a trust, and therefore if upon a consideration of all the circumstances the Court is of opinion that the settlor did not mean to create a trust, the Court will not impute a trust where none in fact was contemplated (*f*).

Field v. Lonsdale. — Thus, where a person, having deposited in a savings bank as much money in his own name as the rules allowed, deposited a further sum in his name as trustee for his sister, but without making any communication to her; and it appeared that he made such deposit with a view of evading the rules of the bank, and not to benefit his sister; and by the act of parliament he retained the control of the fund; the Court held that no trust was created (*g*). So, if a person indorse and hand over promissory notes with the intention of making a testamentary disposition, the transaction does not create a trust *inter vivos* (*h*).

32. **Money scrivener.** — As the business of a money scrivener is now almost obsolete, and the looking for and procuring investments for the money of clients on landed security is now commonly transacted by solicitors, if a sum of money be placed by a client in the hands of *a solicitor for investment, the mere deposit will not *per se* create the relation of trustee and *cestui que trust* between the solicitor and the client (*a*).

33. [**Special credit.** — A letter of advice that a special credit for a particular sum has been opened with the person writing the letter in favour of the person to whom the letter

(*e*) *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Antrobus v. Smith*, 12 Ves. 39; *Evelyn v. Templar*, 2 B. C. C. 148; *Holloway v. Headington*, 8 Sim. 324; *Joyce v. Hutton*, 11 Ir. Ch. Rep. 123. *Ellis v. Nimmo, Lloyd & Goold, t. Sugd.* 333, must be considered as overruled.

(*f*) See *Gaskell v. Gaskell*, 2 Y. &

J. 502; *Hughes v. Stubbs*, 1 Hare, 476; *Smith v. Warde*, 15 Sim. 56.

(*g*) *Field v. Lonsdale*, 13 Beav. 78; and see *Davies v. Otty*, 33 Beav. 540.

(*h*) *Re Patterson's Estate*, 4 De G. J. & S. 422; and see *Kennard v. Kennard*, 8 L. R. Ch. App. 230.

(*a*) *Mare v. Lewis*, 4 I. R. Eq. 219.

is sent, and that it will be paid ratably as certain goods are delivered, upon receipt of certificates of reception of the goods, will not of itself constitute an equitable assignment or specific appropriation of that sum so as to create a trust (b).]

[(b) *Morgan v. Larivière*, 7 L. R. *Larivière v. Morgan*, 7 L. R. Ch. App. H. L. 423, overruling S. C. *sub. nom.* 550.]

OF THE OBJECT PROPOSED BY THE TRUST.

TRUSTS, with reference to their *object*, are *Lawful* or *Unlawful*: the former, such as are directed to some legitimate purpose; the latter, such as are in contravention of the policy of the law.

SECTION I.

OF LAWFUL TRUSTS.

1. *Intention*. — The *general and prima facie* rule is, that the intention of the settlor is to be carried into effect (a).¹

2. *No objection to a trust because the legal estate cannot be so dealt with*. — If the object of the trust do not contravene the *policy* of the law, the mere circumstance that the same end cannot be effectuated by moulding the *legal* estate is no argument that it cannot be accomplished through the medium of the *equitable*. The common law has interwoven with it many technical rules, the reason of which does not appear, or at the present day does not apply; but a trust is a thing *sui generis*, and, where public policy is not disturbed, will be executed by the Court.

3. *Fee upon a fee*. — In legal estates, for example, a fee cannot, except by executory devise, be limited upon a fee — that is, cannot be shifted from one person to another; but this modification of property was allowable in uses, and by the statute of Hen. 8. has gained admittance into legal estates, and the shifting of the fee from one person to another

(a) *Attorney-General v. Sands*, 195, *per* Sir T. Clarke; and see *Attorney-General v. Dedham School*, 28 Beav. 355.
Hard. 494, *per* Lord Hale; *Pawlett v. Attorney-General*, *ib.* 469; *Bacon on Uses*, 79; *Burgess v. Wheate*, 1 Eden,

¹ *Wright v. Miller*, 8 N. Y. 9; 59 Am. Dec. 438.

is now matter of daily occurrence in settlements by way of trust (*b*).

4. **Contingent remainders.** — At law, except in executory devises, a freehold contingent limitation must be supported by a freehold particular estate, and *if the contingent limitation do not vest at the determination of the particular estate, it is extinguished (*a*), but to trusts the rule is held not to be applicable, or, as the doctrine is expressed, the legal estate in the trustees is sufficient to support all the equitable interests (*b*).

5. **Limitations of chattels.** — At law a chattel real can by *executory devise* only, and not by *deed*, and a chattel personal can neither by *will* nor by *deed*, be limited to one person for life, with a limitation over to another; but in trusts a chattel interest, whether real or personal, can be subjected to any number of limitations, provided there be no perpetuity (*c*).

6. **Trusts for a church or chapel.** — If a testator before the Statute of Mortmain (9 G. 2. c. 36) had devised to one that served the cure of a church, and to all that should serve the cure after him, all the tithes, profits, &c.; here, as the successive curates were not a body corporate, they were incapable of taking the legal estate, but equity carried the intention into effect by way of trust, and decreed the devisee or heir to hold in trust for the persons intended to be benefited (*d*). So on the erection of a chapel, the endowment cannot, without an act of parliament, be transmitted at law to the successive preachers and their congregations, but the ordinary mode of accomplishing the object is by vesting the legal estate of the property in trustees (with a power of renewing their number on vacancies by death, &c.), upon trust to per-

(*b*) See Duke of Norfolk's case, 3 Ch. Ca. 35.

[(*a*) But see now 40 & 41 Vict. c. 38.]

(*b*) Chapman v. Blissett, Cas. t. Talb. 145; Hopkins v. Hopkins, ib. 43. ["The principle is, that as the legal estate in the trustees fulfils all feudal necessities, there being always an estate of freehold in existing persons who can render the services to

the lord, there is no reason why the limitations in remainder of the equitable interest should not take effect according to the intention of the testator." Per M. R. Abbiss v. Burney, 17 Ch. D. 211, 229.]

(*c*) See Lord Nottingham's observations in Duke of Norfolk's case, 3 Ch. Ca. 32.

(*d*) Anon. case, 2 Vent. 349.

mit the preacher and congregation for the time being to have the use and enjoyment of the chapel.

7. *Trust for the poor of a parish.*—The limitation of an estate to the *poor of a parish* would *at law*, be void (*e*), because the rules of pleading require the claimants to bring themselves under the gift, and no indefinite multitude, without public allowance, can take by a general name; but by way of trust they are capable of purchasing, for they assert no title in themselves, but only require the trustees to keep good faith (*f*).

8. *Trust of an advowson for the parishioners.*—Again, an *advowson* cannot at law be given to a parish which is not a corporate body, but it may be vested in trustees, upon

* trust for the "*parishioners and inhabitants*," that is, [*86] the parishioners, being inhabitants (*a*) of a parish.

A trust of this kind is not considered a charity, but is administered on the footing of an ordinary trust, and application must be made to the Court, not by way of information, but by action (*b*). The case of an advowson held in trust for a parish has been called an anomalous one. A valid trust, for the benefit of a parish or the parishioners for ever, cannot be made, except on the ground that it is a charity; and the reasoning by which it is sought to bring it under this head is, that the parishioners who elect get no *personal* benefit, but it is a mode of selecting the charity trustee, for the incumbent who performs divine service and ministers to the spiritual wants of the parish is in a large sense a trustee for the parish (*c*).

9. *Who shall elect the clerk.*—From the infinite mischiefs arising from popular election (*d*), the Court, where the settlement does not expressly give the election to the parishioners,

(*e*) Co. Lit. 3, a.

(*f*) Gilb. on Uses, 44.

(*a*) Fearon v. Webb, 14 Ves. 24, per Chief Baron M'Donald; ib. 26, per Baron Graham; Wainwright v. Bagshaw, Rep. t. Hardwicke, by Ridg. 56, per Lord Hardwicke.

(*b*) Attorney-General v. Forster, 10 Ves. 344; Attorney-General v. Newcombe, 14 Ves. 1; Fearon v. Webb, ib. 19.

(*c*) Attorney-General v. Webster, 20 L. R. Eq. 483, see 491.

(*d*) See, in addition to the cases cited in the next note, the observations of Vice-Chancellor Knight Bruce, Attorney-General v. Cuming, 2 Y. & C. Ch. Ca. 158; and 19 & 20 Vict. c. 50, authorizing the sale of advowsons held upon trust for parishioners.

or usage has not put such a construction upon the instrument, will infer the donor's intention to have been that the trustees should themselves exercise their discretion in the election of a clerk for the benefit of the parish (e); but if the language of the instrument, or the evidence of common usage, prevent such a construction, then the parishioners, as the *cestuis que trust* and beneficial owners of the advowson, will be entitled to elect, and the trustees will be bound to present the person upon whom the choice of the electors shall fall (f). Had the point been unprejudiced by decision, Lord Eldon doubted whether the Court could execute such a trust, at least otherwise than *cy près* (g), but, as authority has now clearly settled that the Court must undertake the trust, notwithstanding the difficulties attending it, the only subject for inquiry is, *in what manner* a trust of this kind will be executed.

10. **Meaning of "parishioners and inhabitants."**—The expression "parishioners and inhabitants" is, in itself, [*87] *extremely vague, and has never acquired any very exact and definite meaning (a); but, this doubt removed, another question to be asked is, are women, children, and servants, who are parishioners and inhabitants, to be allowed to vote? It seems the extent of the terms must be taken *secundum subjectam materiam*, with reference to the nature of the privilege which the *cestuis que trust* are to exercise (b), and, if so, none should be admitted to vote, who, from poverty, infancy, or coverture, are presumed not to have a will of their own (c).

(e) See *Edenborough v. Archbishop of Canterbury*, 2 Russ. 106, 109; *Attorney-General v. Scott*, 1 Ves. 418; *Attorney-General v. Foley*, cited *ib.* 418.

(f) *Attorney-General v. Parker*, 3 Atk. 577, *per* Lord Hardwicke; *Attorney-General v. Forster*, 10 Ves. 338, 341, *per* Lord Eldon; *Attorney-General v. Newcombe*, 14 Ves. 6, 7, *per eundem*.

(g) *Attorney-General v. Forster*, 10 Ves. 340, 342.

(a) See *Attorney-General v. Par-*

ker, 3 Atk. 577; *Attorney-General v. Forster*, 10 Ves. 339, 342. See further as to the *Clerkenwell* case, *Carter v. Cropley*, 8 De G. M. & G. 680. By parishioners and inhabitants in *vestry* assembled are meant the persons who by the existing law constitute the vestry. *In re Hayle's estate*, 31 Beav. 139; and see *Etherington v. Wilson*, 20 L. R. Eq. 606, 1 Ch. D. 160.

(b) See *Attorney-General v. Forster*, 10 Ves. 339.

(c) See *Fearon v. Webb*, 14 Ves.

27.

"**Chiefest and discreetest.**" — In a case, where the election was given to "the inhabitants and parishioners, or the major part of the *chiefest and discreetest* of them," it was held that by *chiefest*, was to be understood those who paid the church and poor rates, and by *discreetest*, those who had attained the age of twenty-one (*d*); but Lord Hardwicke said, that, even where "parishioners and inhabitants" stood *without any restriction at all*, it was a reasonable limitation to confine the meaning to those who paid scot and lot, that is, who paid to church and poor (*e*); and so, in a previous case, it seems his Lordship had actually determined (*f*). The Court of Exchequer adopted a similar construction in the *Clerkenwell Case* (*g*), though it does not appear how far the Court was guided in its judgment by the evidence of the common usage (*h*); and Lord Eldon, in a subsequent case, restricted the election to the same class (*i*), but his Lordship's decree was possibly founded on the circumstance, that those only who paid scot and lot were admitted to the *vestry* (*k*); not that, for the purposes of election, the vestry is the representative of the parish (*l*), but in one of the oldest documents the trust was said to be for "the parishioners of the said parish *at a vestry or vestries to be from time to time holden for the said parish*" (*m*). But where the instrument creating the trust contains merely the words "parishioners and *inhabitants," the Court will not [*88] confine the privilege of voting to those paying scot and lot, if it appears from constant usage that the terms are to be taken in a wider and more extensive signification, to include, for instance, all *housekeepers*, whether paying to the church and poor or not (*a*).

(*d*) *Fearon v. Webb*, 14 Ves. 18.

(*e*) *Attorney-General v. Parker*, 3 Atk. 557; S. C. 1 Ves. 43.

(*f*) *Attorney-General v. Davy*, cited *ib.*; S. C. 2 Atk. 213.

(*g*) *Attorney-General v. Rutter*, stated 2 Russ. 101, note.

(*h*) See *Attorney-General v. Forster*, 10 Ves. 345.

(*i*) *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93.

(*k*) See *ib.* 110.

(*l*) *Attorney-General v. Parker*, 3 Atk. 578, *per* Lord Hardwicke; *Attorney-General v. Forster*, 10 Ves. 340, 344, *per* Lord Eldon.

(*m*) See *Edenborough v. Archbishop of Canterbury*, 2 Russ. 94.

(*a*) *Attorney-General v. Parker*, 3 Atk. 576; S. C. 1 Ves. 43. [Now that the compulsory payment of church rates has been abolished by

"Rate-payers." — By persons *paying* to the church and poor must be understood persons *liable to pay*, though they may not have actually paid (*b*); but it seems to be a necessary qualification that they should have been *rated* (*c*), unless, perhaps, the name has been omitted by mistake (*d*), or there is the taint of fraud (*e*).

11. *Mode of electing.* — With respect to the *mode* in which the votes are to be taken, it is clear that the election cannot be conducted by ballot, not only on the general principle that the ballot is a form of proceeding unknown to the common law of England (*f*), but also on the ground, that the right of voting in the election of a clerk is a privilege coupled with a *public duty*, and the trustees have a right to be satisfied that the voters, in the exercise of their right, have fairly and honestly discharged their duty; whereas in election by ballot there are no means of ascertaining for whom each particular elector voted (*g*). The choice of the candidate must therefore be determined by one of the modes known to the common law, viz. either by poll or a show of hands (*h*). However, the *cestuis que trust* may *expressly* agree among themselves that they will abide by the declaration of the result of the ballot, and will ask no questions how the individual votes were given; or such a contract may be *inferred* from long and clear antecedent usage (*i*). But it is said an agreement of this kind can apply only to each particular election as it occurs, for any one parishioner has a right

31 & 32 Vict. c. 109, paying such rates cannot, it is conceived, be regarded as necessary in any case for a qualification to vote.]

(*b*) See Attorney-General v. Foster, 10 Ves. 339, 346.

(*c*) Edenborough v. Archbishop of Canterbury, 2 Russ. 110.

(*d*) Edenborough v. Archbishop of Canterbury, 2 Russ. 110.

(*e*) S. C. ib. 111.

(*f*) Faulkner v. Elger, 4 Barn. & Cress. 449.

(*g*) Edenborough v. Archbishop of Canterbury, 2 Russ. 105, 108, 109, per Lord Eldon.

(*h*) See ib. 106, 110. [Some doubt has, however, been thrown upon this in the recent case of Shaw v. Thompson, 3 Ch. D. 233, in which V. C. Bacon intimated an opinion that as voting by ballot had become common, and no objection could now be taken as in the case of Faulkner v. Elger, *ubi sup.* to a ballot on the ground that it afforded no opportunity for a scrutiny, an election by that means would be valid.]

(*i*) See Edenborough v. Archbishop of Canterbury, 2 Russ. 105, 106, 108, 109.

to insist that the coming election shall be conducted on a different principle; it would be a bold thing to say, *that the parish of to-day could bind the parish [*89] of to-morrow to deviate from the original and legitimate mode (a).

[Where an election had taken place, the Court, although of opinion that the proceedings in vestry determining the mode of election had been illegal and irregular, refused to set the election aside, on the ground that there was no evidence that the election itself had been improperly conducted, or that any voter had been prevented from recording his vote (b).]

12. *Trusts for accumulation.* — Again, upon principles founded on the Law of Tenure, the freehold *in presenti* must be vested in some person *in esse*; but under the system of trusts, which are wholly independent of feudal rules, a settlor may give directions for an accumulation of rents and profits, and it does not vitiate the trust that there is no ascertained owner of the equitable freehold in possession (c).

Trusts for accumulation must not lead to a perpetuity. — But trusts for accumulation must be confined within the limits established against perpetuities.¹ A settlor is permitted (by

(a) See 2 Russ. 106; [Shaw v. Thompson, 3 Ch. D. 233.]

(c) See Fearn's C. R. by Butler, 537, note (x); [Abbiss v. Burney, 17

[(b) Shaw v. Thompson, 3 Ch. D. 233.] Ch. D. 211.]

¹ *Accumulations.* — Trusts for accumulations must be kept within the requirements of the rule regarding perpetuities, but aside from those, the settlor may direct the disposition, or the accumulation of rents, profits and all income, so as to cut off the beneficial enjoyment of the trust property, for the same length of time that he can control the legal estate; Killam v. Allen, 52 Barb. 606; Hillyard v. Miller, 10 Barr, 326; Hooper v. Hooper, 9 Cush. 123; Fosdick v. Fosdick, 6 Allen, 43; Thorndike v. Loring, 15 Gray, 391; if a party, even though not in existence at the time, have a vested right of possession, then the length of time of accumulation is immaterial, the direction to accumulate results rather in a restraint upon alienation, than a too lengthy period of accumulation; Gray on Perpetuities, 401; Otis v. Coffin, 7 Gray, 511; if the accumulation is a condition precedent, or for too long a time, the provision is altogether void, as it cannot be varied; Gray on Perpetuities, 402; Thorndike v. Loring, 15 Gray, 391; if a bequest is properly made, with an illegal direction to accumulate, the former may be held good, and the latter declared void; Philadelphia v. Girard, 45 Pa. St. 1; Phelps v. Pond, 23 N. Y. 69; Craig v. Craig, 3 Barb. Ch. 76; Hawley v. James, 5 Paige, 318; but if the gift takes effect only after the accumulation, they must stand or fall together;

analogy to the duration of a regular entail under a common law conveyance) to fetter the *alienation* of property for a life or lives in being and twenty-one years; and the power of preventing the *enjoyment* of property, by directing an accumulation of the annual proceeds, is restricted to the same period. If the trust exceed this boundary it is void *in toto*, and cannot be cut down to the legitimate extent (*d*).

Phipps v. Kelynge. — But no objection exists on the ground of a perpetuity, where rents, though directed to be accumulated, are applicable as a vested interest *de anno in annum*. Thus, where a testatrix devised a term which had thirty-three years to run, upon trust, from time to time, to lay out the profits in the purchase of lands to be settled upon A. for life, remainder to B. in tail, remainders over, here, inasmuch as the *cestuis que trust* could at any time call for the investment of the rents in land, and when B. attained his age, and could suffer a recovery, A. and B. were entitled to call for the assignment of the lease, it was held the trust was [*90] good (*e*). And generally, although *there be an accumulation directed, which might by possibility extend beyond a life in being and twenty-one years, yet if

(*d*) *Marshall v. Holloway*, 2 Swans. 432; *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54; *Curtis v. Lukin*, 5 Beav. 147; *Boughton v. James*, 1 Coll. 26; S. C. on appeal, 1 H. L. 406; *Browne v. Stoughton*, 14 Sim. 369; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Turvin v. Newcombe*, 3 K. & J. 16; [*Cochrane v. Cochrane*, 11 L. R. Ir. 361.]

(*e*) *Phipps v. Kelynge*, 2 V. & B. 57, note (*b*). In *Curtis v. Lukin*, 5 Beav. 147, the accumulation was held to be void, as the respective interests of the parties could not be ascertained until the time of renewal arrived. The parties might or might not agree upon a distribution amongst themselves during the interim, but this could not affect the legal construction.

Amory v. Lord, 5 Seld. 408; the possibility of illegal accumulation determines the validity or invalidity of it; *Hawley v. James*, 5 Paige, 318; the interest on a legacy illegally accumulated goes into the residue as capital; 1 Jar. on Wills, 292; *Hull v. Hull*, 24 N. Y. 647; and the income of accumulations are subject to the same rules as the accumulations; Jar. on Wills, 292; in many of the states the rules regarding accumulations are changed by statute; where there are no controlling statutes, if an unconditional gift to charity be made, it will be regarded as good, and the income will be distributed in charity and will not go to the next of kin; Gray on Perpetuities, 404; *Odell v. Odell*, 10 Allen, 1; *American Academy v. Harvard College*, 12 Gray, 582; *Att'y Gen'l v. Butler*, 123 Mass. 304; *Levy v. Levy*, 33 N. Y. 97; *Wilson v. Lynt*, 30 Barb. 124; *Tainter v. Clark*, 5 Allen, 66; *Williams v. Williams*, 8 N. Y. 525; *Hillyard v. Miller*, 10 Pa. St. 326.

the whole beneficial interest in the accumulations must by the terms of the settlement become vested within a life in being and twenty-one years, there is no perpetuity, for in this case the beneficiaries may immediately upon the vesting, and therefore within the allowed limits, put an end to the accumulation (a).

13. **Thellusson Act.** — The 39 & 40 Geo. 3, c. 98, commonly called the Thellusson Act, or Lord Loughborough's Act, has now further restricted the period of accumulation, by limiting it to "*the life or lives of any grantor or grantors, settlor or settlors; OR the term of twenty-one years from the death of the grantor, settlor, deviser, or testator; OR during the minority, or respective minorities of any person or persons who shall be living, or in ventre sa mere, at the time of the death of the grantor, deviser, or testator; OR during the minority, or respective minorities, of any person or persons who, under the uses or trusts of the deed, surrender, will, codicil, or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated.*"

Act embraces both simple and compound accumulation. — The following points have been resolved upon the construction of this act? — 1. The statute embraces *simple* as well as *compound* accumulation. By the former is meant the collection of a principal sum by the mere addition of the annual proceeds, while the interest upon the accumulating fund either results undisposed of to the settlor or his representative, or passes to the residuary devisee or legatee. Compound accumulation is, where not only the income *de anno in annum* is added altogether, but the fund is further increased by the interest upon the income (b).

2. **Applies to case of suspended enjoyment, though the right to the enjoyment be vested.** — The act applies, though the

(a) *Oddie v. Brown*, 4 De G. & Jon. 179; *Bateman v. Hotchkin*, 10 Beav. 426; *Bacon v. Proctor*, T. & R. 31; and see *Briggs v. Earl of Oxford*, 1 De G. M. & G. 368; *Williams v. Lewis*, 6 H. L. Cas. 1013.

(b) *Shaw v. Rhodes*, 1 M. & Cr. 135; S. C. by title of *Evans v. Hellier*, 5 Cl. and Fin. 114.

accumulating fund be from the first a vested interest, so that not the *right to the enjoyment*, but only the *actual enjoyment*, is suspended; as where a settlor directs rents to be accumulated to raise a certain sum for A., to be paid to him on the completion of the accumulation; so that A. has a vested interest in the rents as they arise (c). 3. An accumulation can be directed for one only of the periods allowed by the statute, and not for two or more of the periods combined (d). *4. The accumulation, though directed to commence not at the testator's death, but at some subsequent period, must still terminate at the expiration of twenty-one years from the testator's death (a), and the term of twenty-one years is to be reckoned exclusive of the day on which the testator died (b).

5. **Where the limit exceeded, the trust is good pro tanto.** — If the trust exceeds the limits prescribed by the statute, but not the limits allowed by the common law, the accumulation will be established to the extent permitted by the Act, and will be void for the excess only (c). 6. If an accumulation be not *expressed* but *implied*, as in the gift of a residue to *all* the children of A., and no life estate given to A. himself, so that the class cannot be ascertained until his death, and the fund must accumulate during the interim, it is the better opinion, as originally decided by Lord Langdale (d), that the prohibition of the statute was meant to apply (e). The late Vice-Chancellor of England observed that the statute was intended only to put an end to accumulations *expressly* directed (f); and in a subsequent case before him so decided (g). And the same view was adopted by Sir J.

(c) *Shaw v. Rhodes*, *ubi supra*; and see *Oddie v. Brown*, 4 De G. & Jon. 179.

(d) *Wilson v. Wilson*, 1 Sim. N. S. 288; [*Jagger v. Jagger*, 25 Ch. D. 729;] see *Lady Rosslyn's Trust*, 16 Sim. 391.

(a) *Attorney-General v. Poulten*, 3 Hare, 555.

(b) *Gorst v. Lowndes*, 11 Sim. 434.

(c) *Griffiths v. Vere*, 9 Ves. 127; *Longdon v. Simpson*, 12 Ves. 295;

Haley v. Bannister, 4 Mad. 275; *Shaw v. Rhodes*, 1 M. & Cr. 155; *Crawley v. Crawley*, 7 Sim. 427; *Attorney-General v. Poulten*, 3 Hare, 555.

(d) *McDonald v. Bryce*, 2 Keen, 276.

(e) *Morgan v. Morgan*, 4 De G. & Sm. 170; *Tench v. Cheese*, 6 De G. M. & G. 453.

(f) *Elborne v. Goode*, 14 Sim. 165.

(g) *Corporation of Bridgenorth v. Collins*, 15 Sim. 538.

Romilly, Master of the Rolls (*h*). But the decision in the last case in which the Master of the Rolls so held was reversed on appeal by the Lord Chancellor and Lord Justices, and though the reversal rested upon the ground that as the will was worded, an accumulation was *expressly* directed (*i*), the Lord Chancellor felt himself called upon to say that the distinction taken by the Master of the Rolls between an accumulation *expressed* and an accumulation *implied* was untenable; and he justly remarked as to the case of infancy (cited in support of the opposite view), that if of age, the infant, instead of spending, might accumulate the rents, and the Court did no more than exercise a discretion for the infant, which was a very different thing from creating a suspense fund to go to somebody who had no title during the accumulation.

To whom the excess shall belong.—The statute proceeds to declare, that “The produce of the property, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, shall go and be received by * such person or persons as would have been entitled [*92] thereto if such accumulation had not been directed.”

14. Subsequent limitations not accelerated.—If there be a series of limitations of *real* estate, and one of them be upon trust to accumulate the rents beyond the limits allowed by the Act, the subsequent limitations are in general not accelerated; but the interim limitation, which is void under the Act, will result for the benefit of the heir-at-law (*a*); and if

(*h*) *Bryan v. Collins*, 16 Beav. 14; *Tench v. Cheese*, 19 Beav. 3.

(*i*) *Tench v. Cheese*, 6 De G. M. & G. 453.

(*a*) *Eyre v. Marsden*, 2 Keen, 564; *Nettleton v. Stephenson*, 3 De Gex & Sm. 386; *Edwards v. Tuck*, 3 De G. M. & G. 40; *Re Drakeley's Trust*, 19 Beav. 395; *Green v. Gascoigne*, 11 Jur. N. S. 145; S. C. 4 De G. Jon. & Sm. 565; *Smith v. Lomas*, 10 Jur. N. S. 743; *Talbot v. Jevers*, 20 L. R. Eq. 255; and see *Griffiths v. Vere*, 9 Ves. 127. In *Trickey v. Trickey*, 3 M. & K. 560, the testator's daughter was held en-

titled to the excess of the accumulations, but *semble* not as tenant for life, but as the testator's heiress-at-law. In *Shaw v. Rhodes*, 1 M. & Cr. 135; S. C. by the title of *Evans v. Hellier*, 5 Cl. & Fin. 114, Thomas, the devisee subject to the accumulations, took the excess beyond the limits of the statute; but James Shaw was probably the testator's heir, and as James had died before the institution of the suit, Thomas, it is likely, thereupon became the heir of the testator, and took in that character. But see *Re Clulow's Trust*, 1 J. & H. 648.

the resulting trust be a *chattel interest*, carved out of real estate, it will devolve, on the death of the heir, on the personal representative of the heir (*b*); and if the resulting interest be an estate *pur autre vie*, it is the better opinion that it also goes to the heir's personal representative (*c*). But under the late Wills Act, 1 Vict. c. 26, s. 25, if the will contain a residuary devise, and there is no evidence of a contrary intention on the face of the will, the void accumulations will go to the residuary devisee.

15. **In personal estate.**—In *personal* estate, if there be a residuary legatee, the excess beyond the allowed period of accumulation will fall into the residue (*d*), and where the residue is settled on A. for life, remainder to B., will form part of the capital (*e*).

16. **Residue.**—If the subject of the accumulation be the income of the residue itself, the void accumulation will, according to the nature of the residue, *i.e.*, *real or personal*, result to the heir-at-law or to the next of kin (*f*).

17. **Charge.**—If an estate be devised *subject* to a void direction to accumulate in such terms that the void [*93] accumulation, if valid, would have *been construed a mere *charge*, it will, like any other charge which fails (*a*), sink for the benefit of the devisee (*b*).

18. **Exceptions from the Act.**—Lastly, the statute provides, that “nothing in the Act contained shall extend to any provision for *payment of debts* (*c*) of any grantor, settlor,

(*b*) *Sewell v. Denny*, 10 Beav. 315.

(*c*) *Barrett v. Buck*, 12 Jur. 771; see *Halford v. Stains*, 16 Sim. 488, *contra*.

(*d*) *Haley v. Bannister*, 4 Mad. 275; *O'Neill v. Lucas*, 2 Keen, 313; *Webb v. Webb*, 2 Beav. 493; *Attorney-General v. Poulden*, 3 Hare, 555; *Jones v. Maggs*, 9 Hare, 606; *Re Drakeley's Trust*, 19 Beav. 395.

(*e*) *Crawley v. Crawley*, 7 Sim. 427.

(*f*) *McDonald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, 2 Keen, 564; *Pride v. Fooks*, 2 Beav. 430; *Elborne*

v. Goode, 14 Sim. 165; *Bourne v. Buckton*, 2 Sim. N. S. 91; *Edwards v. Tuck*, 3 De G. M. & G. 40; *Mathews v. Keble*, 4 L. R. Eq. 467; 3 L. R. Ch. App. 691; *Simmons v. Pitt*, 8 L. R. Ch. App. 978; *Talbot v. Jevers*, 20 L. R. Eq. 255. [*Weatherall v. Thornburgh*, 8 Ch. D. 261.]

(*a*) See *Tucker v. Kayess*, 4 K. & J. 339.

(*b*) *Re Clulow's Trust*, 1 J. & H. 639; *Combe v. Hughes*, 34 Beav. 121; 2 De G. J. & S. 657.

(*c*) *Bateman v. Hotchkin*, 10 Beav. 426.

or devisor, or other person or persons, or for *raising portions* for any child of the settlor or devisor, or any person *taking an interest* under the settlement or devise, or to any direction touching the produce of *timber or wood*." The words "any other person or persons" authorize a grantor, settlor, or devisor to provide for the debts of any stranger whomsoever (*d*); and the exception in the statute extends to *liabilities* of a testator though no *debt* had actually accrued at the time of his death (*e*). By children must, of course, be understood exclusively legitimate children (*f*). And the accumulation to be protected by the clause must be a provision for raising portions out of the *corpus*, not an accumulation of the *corpus* itself, for the purpose of making a gift of the aggregate fund (*g*), and must be a provision for children certain, and not a chance limitation in favour of any child that may happen to survive certain persons not necessarily standing in the relation of parent and child, but uncles or aunts, &c. (*h*). By "taking an interest under the devise" is meant a *substantial* interest. A small annuity, for instance, to the parent, would not justify an accumulation of the residue of the rents beyond the limits of the Act for raising portions for the children (*i*); and it was once considered that it was necessary that an interest should be taken not merely under the *will* generally, but under the *particular* gift, devise or bequest, which contained the provision for accumulation (*k*); but this view has been since overruled, so that now, if the person take a substantial interest in any property, under the will, it is sufficient (*l*).

(*d*) See *Barrington v. Liddell*, 2 De G. M. & G. 497; 10 Hare, 415.

(*e*) *Varlo v. Faden*, 27 Beav. 255.

(*f*) *Shaw v. Rhodes*, 1 M. & Cr. 135, see 159.

(*g*) *Eyre v. Marsden*, 2 Keen, 564; *Bourne v. Buckton*, 2 Sim. N. S. 91; *Edwards v. Tuck*, 3 De G. M. & G. 40; *Jones v. Maggs*, 9 Hare, 605; *Wildes v. Davies*, 1 Sm. & Gif. 475; *Watt v. Wood*, 2 Drew & Sm. 56; and see *Beach v. St. Vincent*, 3 De Gex & Smale, 678. In *Burt v. Sturt*, 10 Hare,

427, this was said to be "a shadowy distinction."

(*h*) *Burt v. Sturt*, 10 Hare, 415.

(*i*) *Shaw v. Rhodes*, 1 M. & Cr. 159; and see *Bourne v. Buckton*, 2 Sim. N. S. 91; but see *Evans v. Helier*, 5 Cl. & Fin. 127; *Barrington v. Liddell*, 2 De G. M. & G. 500; *Edwards v. Tuck*, 3 De G. M. & G. 63.

(*k*) *Bourne v. Buckton*, 2 Sim. N. S. 91, see 101; *Morgan v. Morgan*, 4 De Gex & Smale, 164.

(*l*) *Barrington v. Liddell*, 10 Hare,

The portions intended by the Act are not necessarily
[*94] *portions *created* by the deed or will directing the accumulation, but may be portions pre-existing (a).

[19. **Direction to keep up a policy.**—A direction by will to pay out of the income of the testator's property the premiums on a policy of assurance effected on the life of another person by the testator in his lifetime, or to be effected after his death on the life of a person *in esse* at his death is not an accumulation within the Act, and may be continued after the expiration of 21 years from the testator's death (b).]

20. **Scotland and Ireland.**—Scotland was expressly excepted from the Act; but it has since been extended to it by 11 & 12 Vict. c. 36, s. 41.

As the statute was passed a short time before the union with Ireland, Irish estates are not affected by it (c). But where the rents of Irish property belonging to a domiciled Englishman were directed to be accumulated and become part of the personal estate, it was held that although the rents themselves might be invested for more than twenty-one years, the income arising from their investment could not be accumulated (d); and the Act applies to an accumulation of rents of leaseholds in England, but belonging to a testator domiciled in Ireland (e).

SECTION II.

ON UNLAWFUL TRUSTS.

1. **Trusts against the policy of law.**—The Court will not permit the system of trusts to be directed to any object that contravenes the *policy* of the law (f).¹ Thus, if the trust of

415; 2 De G. M. & G. 500; Edwards v. Tuck, 3 De G. M. & G. 40; Burt v. Sturt, 10 Hare, 415; and see Watt v. Wood, 2 Dr. & Sm. 60.

(a) Halford v. Stains, 16 Sim. 488; Barrington v. Liddell, 2 De G. M. & G. 498; Middleton v. Losh, 1 Sm. & Gif. 61; and see Burt v. Sturt, 10 Hare, 415.

[(b) Bassil v. Lister, 9 Hare, 177; Re Vaughan, W. N. 1883, p. 89.]

(c) Ellis v. Maxwell, 12 Beav. 104; Heywood v. Heywood, 29 Beav. 9.

(d) Ellis v. Maxwell, *ubi supra*.

(e) Freke v. Lord Carbery, 16 L. R. Eq. 461.

(f) See Attorney-General v. Pearson, 3 Mer. 399; Hamilton v. Waring,

¹ Where a trust is contrary to statute or public policy, equity will not aid in enforcing it; Servis v. Nelson, 1 McCart. 94; Lemmond v. Peoples,

a *chattel* be limited to A. and his *heirs*, it will nevertheless be personal estate, and vest in the executors (*g*), for to hold the contrary would shake the first principles of law and confound the great landmarks of property. So the trust of a *chattel* cannot be entailed, as if it be limited to A.

and the heirs of his body, with *remainder to B., the [*95] absolute interest vests in A., and the remainder to B.

is a nullity (*a*). But trusts of terms attendant upon the inheritance, while they existed, were always excepted from the rule; for these, partly to protect the estate from secret incumbrances, and partly to keep the property in the right channel (*b*), were made in equity to follow, as shadows, the devolution of the freehold (*c*).

2. *Illegitimate children*.—Again, a person cannot settle property upon trust for illegitimate children *to be thereafter born*, since this tends to immorality, but the declaration of trust is void, and the beneficial interest results to the settlor (*d*). But illegitimate children born at the date of the settlement

2 Bligh, 209; *Earl of Kingston v. Lady Pierepoint*, 1 Vern. 5.

(*g*) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; S. C. 1 Vern. 164, *per* Lord Guildford; *Hunt v. Baker*, 2 Freem. 62; *Attorney-General v. Sands*, Nels. 133.

(*a*) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; *Hunt v. Baker*, 2 Freem. 62.

(*b*) See *Willoughby v. Willoughby*, 1 T. R. 765.

(*c*) For the law upon this subject, see *Sugd. Vend. & Purch.*

(*d*) *Medworth v. Pope*, 27 Beav. 71;

and see *Hill v. Crook*, 6 L. R. H. L. 265; *Dorin v. Dorin*, 7 L. R. H. L. 568; *In re Ayles' Trusts*, 1 Ch. D. 282; *Wilkinson v. Wilkinson*, 1 Y. & C. Ch. Ca. 657; *Pratt v. Matthew*, 22 Beav. 328; *Howarth v. Mills*, 2 L. R. Eq. 389. The case of *Occleston v. Fullalove*, 42 L. J. N. S. Ch. 514, has since been reversed, 9 L. R. Ch. App. 147; 43 L. J. N. S. Ch. 297; and the law on the subject has, by the decisions of L.J.J. James and Mellish, against the opinion of Lord Selborne, been considerably modified; see and

6 Ired. Eq. 137; *Stevens v. Ely*, 1 Dev. Eq. 493; as where it is attempted to create a trust for an alien in real estate when he is forbidden to hold it; *Neilson v. Lagow*, 12 How. 107; *Anstice v. Brown*, 6 Paige, 448; *Craig v. Leslie*, 3 Wheat. 563; *Hubbard v. Goodwin*, 3 Leigh, 492; *Philips v. Crammond*, 2 Wash. C.C. 441; *Hamersley v. Lambert*, 2 Johns. Ch. 508; *Atkins v. Kron*, 2 Ired. Eq. 423; or a negro; *Dunlop v. Harrison*, 14 Gratt. 251; *Skrine v. Walker*, 3 Rich. Eq. 262; *Graves v. Allan*, 13 B. Mon. 190; *Leiper v. Hoffman*, 26 Miss. 615; *Osterman v. Baldwin*, 6 Wall. 116; an illegitimate child, born or begotten, may be a *cestui que trust*; *Gardner v. Heyer*, 2 Paige, 11; *Collins v. Hoxie*, 9 Paige, 81; but not one yet to be begotten, as it would be against good morals; and a trust will not be enforced if the consideration is immoral or against public policy; *Battinger v. Budenbecker*, 63 Barb. 404; *Ownes v. Ownes*, 8 C. E. Green, 60; *Urket v. Coryell*, 5 Watts & S. 61.

may take under the description of children if there were no legitimate children at the time, or the illegitimate children are otherwise indented as *personæ designatæ* (e). But a gift to A. for life, with remainder to his child or children, will not be taken to designate an illegitimate child of A. born previously to the date of the will, though A had no legitimate child at the date of the will, and was 57 years old, and so unlikely to have legitimate children (f).

3. **Trusts for corporations.**—So a trust of real estate cannot be declared in favour of a *corporation* without a licence from the Crown, for the same mischief would follow from putting equitable, as in putting legal, estates into mortmain (g).

4. **Trusts for alien.**—Where a trust of real estate was, before the late Act (h), declared in favour of an *alien*, the Crown might have claimed the benefit of it by suit in equity, [*96] without the form of a previous *inquisition*, for the subject was sufficiently protected by the decree of the Court (a).

5. **Trust for charity.**—Neither lands nor property savouring of the realty can be conveyed upon trust for a *charity*, unless the requirements of the mortmain acts (b), as respects attestation by two witnesses and enrolment (c), and the absence of any reservation for the benefit of the grantor (d),

consider the judgments of the L.JJ., and more particularly that of Lord Selborne.

(c) *Gabb v. Prendergast*, 3 Eq. Rep. 648; *Clifton v. Goodbun*, 6 L. R. Eq. 278; *Holt v. Sindrey*, 7 L. R. Eq. 170; *Savage v. Robinson*, *ib.* 176; *Lepine v. Bean*, 10 L. R. Eq. 160; *Crook v. Hill*, 6 L. R. Ch. App. 311, S. C. *nom.* *Hill v. Crook*, 6 L. R. H. L. 265; *Wilson v. Atkinson*, 4 De G. J. & S. 455; *Milne v. Wood*, 42 L. J. N. S. Ch. 545; *In re Brown's Trust*, 16 L. R. Eq. 239; *Dorin v. Dorin*, 17 L. R. Eq. 463; *Occleston v. Fullalove*, 9 L. R. Ch. App. 147; *In re Goodwin's Trusts*, 17 L. R. Eq. 345; [*Re Humphries*, 24 Ch. D. 691.]

(f) *Paul v. Children*, 12 L. R. Eq. 16.

(g) See *Shep. Touch.* 509; *Sand. on Uses*, 339, note E. 15 Ric. 2. c. 5.

(h) 33 Vict. c. 14.

(a) See *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92; *Vin. Ab. Alien*, A. 8; *Godfrey v. Dixon*, *Godb.* 275; *Br. Feff. al. Uses*, 389; *King v. Holland*, Al. 16; *Styl.* 21; *Burney v. Macdonald*, 15 Sim. 6; *Burgess v. Wheate*, 1 Eden, 187; *Barrow v. Wadkin*, 24 Beav. 1; see now 33 Vict. c. 14.

(b) 9 G. 2. c. 36; 24 Vict. c. 9; 25 & 26 Vict. c. 17. The 9 G. 4. c. 85, gives validity to informal purchases made before that Act.

(c) *Doe v. Hawthorn*, 2 B. & Ald. 96; *Doe v. Munro*, 12 M. & W. 845.

(d) *Limbrey v. Gurr*, 6 Mad. 151; *Attorney-General v. Munby*, 1 Mer. 327.

be complied with. And where lands were conveyed to trustees for a charity by a deed duly enrolled, and without any reservation upon the face of it to the grantor, but upon a *secret* trust that the deed should not operate until after the settlor's death, the deed was, upon bill filed, declared void, and decreed to be set aside (*e*). But such a secret trust must be proved, and retention of possession by the settlor during his life, though a circumstance of evidence does not necessarily imply a previous fraudulent agreement (*f*). By a recent Act (*g*) it is declared that no endowment of a charity shall be void, by reason that it contains the reservation of a *nominal rent*, or, of *mines* or *easements*, or certain *building covenants*, or a *right of entry* on nonpayment of rent or breach of covenants; or, in the case of *copyholds*, that the endowment was not by *deed*, or in the case of a sale for full value, that the consideration was a rent reserved; and all previous *sales*, notwithstanding defects, are to be deemed valid on enrolment of the deed within twelve months from the passing of the Act, which period was afterwards extended by successive Acts up to the 17th May, 1866, exclusive (*h*). A subsequent Act (*i*) authorizes any deed not duly enrolled to be enrolled *nunc pro tunc*, with the leave of the *Court* of Chancery, to be obtained upon summons in a summary way without service thereof upon any person. And by a later Act still (*k*) it is enacted that if the *clerk of enrolments* in Chancery shall be satisfied by affidavit or otherwise that the assurance was made *bonâ fide* for valuable consideration, without fraud or collusion, and that possession is held under such assurance, *and that [*97] the omission of enrolment arose from ignorance or inadvertency, or from the destruction thereof by time or accident, he may enrol the same *nunc pro tunc*.

[6. **Recreation Grounds.**—The Act of 22 Vict. c. 27, exempts from the mortmain act any grant or conveyance

(*e*) *Way v. East*, 2 Drew. 44.

(*h*) 25 & 26 Vict. c. 17; 27 & 28

(*f*) *Fisher v. Brierley*, 1 De G. F. & J. 643.

Vict. c. 13.

(*i*) 29 & 30 Vict. c. 57.

(*g*) 24 Vict. c. 9; and see the Amendment Act, 26 & 27 Vict. c.

(*k*) 35 & 36 Vict. c. 24, s. 18.

of land to trustees for open public grounds, for recreation of adults or playgrounds for children.]

7. *Erection of buildings.*—The Act of 31 & 32 Vict. c. 44, exempts from the mortmain act all dispositions of land (except by will) made after the passing of the Act (13th July, 1868), to trustees of any society associated together for *religious* purposes, or for the promotion of *education, arts, literature, science*, or other like purposes, for *the erection on such land of buildings* for such purposes, or any of them.

8. *Parks, schools, and museums.*—And the Act of 34 Vict. c. 13, exempts from the statutes of mortmain all gifts of land by *deed or will* for the purposes of a *public park*, a *school house* for an elementary school, or a *public museum*, and all bequests of personalty for the like purposes; but gifts by will, and voluntary grants, must be made twelve months before the death of the testator or grantor, and must be inrolled within six calendar months after the time when the same shall come into operation, and the gift must not exceed twenty acres for a park, or two acres for a museum, or one acre for a school.

9. *Perpetuities.*—A *perpetuity* will no more be tolerated under cover of a trust, than when it displays itself undisguised in a settlement of the legal estate (a).¹ “If in

(a) See Duke of Norfolk's case, 3 Ch. Ca. 20, 28, 35, 48.

¹ *Perpetuities.*—The same law applies to equitable as to legal estates; Schettler v. Smith, 41 N. Y. 329; Burrill v. Boardman, 43 N. Y. 254; Knox v. Jones, 47 N. Y. 397; Sears v. Putnam, 102 Mass. 5; Lovering v. Worthington, 106 Mass. 86; Barnett's App. 46 Pa. St. 392; 86 Am. Dec. 502. A trust which cannot vest in the time allowed by law is void; Sears v. Russell, 8 Gray, 86. A testator cannot direct an estate to be limited beyond that time, and persons taking, must be capable of taking directly; Barnum v. Barnum, 26 Md. 119; Fonda v. Penfield, 56 Barb. 503. But not so as to changing trustees; Clark v. Platt, 30 Conn. 282. A trust for a charitable object is not subject to the rule of perpetuities; Miller v. Chittenden, 2 Ia. 362; Gass v. Wilhite, 2 Dana, 183; Yard's App. 64 Pa. St. 95; Griffin v. Graham, 1 Hawks. 131; Beekman v. Bonsor, 23 N. Y. 308; Bascom v. Albertson, 34 N. Y. 598. If the contingency attaching to a remainder of an equitable estate may happen, the property is held in abeyance, and then either vests or fails; Newark Church v. Clark, 41 Mich. 730; Hardenburgh v. Blair, 30 N. J. Eq. 42. A direction for accumulation during minority, the income to go to the minor for life, and at his death the principal to others is void; see N. Y. Rev. St. 2180 *et. seq.* § 3. A devise to son, in case he can be found after diligent inquiry, correspondence, and publication for the space of twenty years, is not void for

equity," said Lord Guildford, "you could come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of Chancery, but would be destructive to the commonwealth" (*b*). Thus, if an estate be limited to trustees for 500 years upon the trusts thereafter declared, and subject thereto in strict settlement, and then the trusts are declared to be to enter and manage the estate during the minority of any tenant for life or in tail, the trusts are void, for the tenant in tail cannot bar them, and they might last for centuries (*c*). [So if real estate be devised to trustees upon trust to retain a yearly sum out of the rents and profits, and subject thereto the estate is devised in strict settlement, and the trustees are directed during the continuance of the limitations to accumulate the yearly sum, the trust is void (*d*).]

* **Restraint of anticipation.**—So, again, if a power [*98] of appointment amongst the issue be contained in a marriage settlement, the donee of the power cannot appoint to the daughters for their sole and separate use *without power of anticipation*, for this would tie up the estate beyond the legal limits. While the appointment, therefore, to the daughters is good, the condition in restraint of alienation is void (*a*).

(*b*) S. C. 1 Vern. 164.

(*c*) Floyer v. Bankes, 8 L. R. Eq. 115; and see Sykes v. Sykes, 13 L. R. Eq. 56, and the cases there cited.

[(*d*) Cochrane v. Cochrane, 11 L. R. Ir. 361; Browne v. Stoughton, 14

Sim. 369; and see Longfield v. Bantry, 15 L. R. Ir. 101.]

(*a*) See Armitage v. Coates, 36 Beav. 1, and the cases there cited; and *Re Cunynghame's Settlement*, 11 L. R. Eq. 324; *Re Teague's Settle-*

accumulation; Williams Est. 13 Phila. (Pa.) 325; to pay \$5000 per year from the income alone; Veazie v. Forsaith, 76 Me. 172; Whipple v. Fairchild, 139 Mass. 262. Lease of railroad for 999 years is good; Todhunter v. Des Moines & C. R. R. Co. 58 Ia. 205. For instances where not void as a perpetuity, see Spindle v. Shreve, 9 Biss. C. C. 199; Fullerton v. Ins. Co. 10 Abl. (N. Y.) New Cases, 364; for others which are void, see Kent v. Dunham, 142 Mass. 216; Brattle Sq. Church v. Grant, 3 Gray, 142; Nightingale v. Burrell, 15 Pick. 104. "Transgressive" trusts in equity the same as perpetuities at law; Philadelphia v. Girard, 45 Pa. St. 9; 84 Am. Dec. 470. It is to be borne in mind that the general rules relating to perpetuities do not apply to charitable trusts.

10. **Strict settlement of chattels.**—Should a testator devise his real estate in strict settlement, and then bequeath his personal estate to *such tenant in tail* as should first attain twenty-one, then, if the tenant in tail at the testator's death be not adult, the event might not occur for a century, and the trust would be void (*b*). But should a testator bequeath his personal estate upon such trusts as would correspond to the limitations of his real estate, with a proviso that it should not vest absolutely in any tenant in tail unless he attained twenty-one, the trust would be good, for as personal estate cannot descend, the testator must by a tenant in tail have meant a tenant in tail by *purchase* (*c*).

11. **Trust for indemnity.**—The question often arises in practice whether the trust of one estate to *indemnify* another estate against a perpetual outgoing be not void for perpetuity, but it has been held in Ireland that such a trust is good, and that the Statute of Limitations does not apply to it (*d*).

12. **Restriction of alienation.**—Trusts cannot be created with a proviso that the interest of the *cestui que trust* shall not be *alienated* (*e*), or shall not be made subject to the claims of *creditors* (*f*).¹ And if it can only be ascertained that the

ment, 10 L. R. Eq. 564; [*Re Ridley*, 11 Ch. D. 645; *Herbert v. Webster*, 15 Ch. D. 610; *Cooper v. Laroche*, 17 Ch. D. 368.]

(*b*) *Gosling v. Gosling*, 1 De G. J. & S. 17, *per* L. C.

(*c*) *Gosling v. Gosling*, 1 De G. J. & S. 1.

(*d*) *Massy v. O'Dell*, 10 Ir. Ch. Rep. 1.

(*e*) *Snowdon v. Dales*, 6 Sim. 524; *Green v. Spicer*, 1 R. & M. 395;

Graves v. Dolphin, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. 429; *Ware v. Cann*, 10 B. & Cr. 433; *Bradley v. Peixoto*, 3 Ves. 324; *Hood v. Oglander*, 34 Beav. 513; *Re Jones's Will*, W. N. 1870, p. 14; [*Hunt-Foulston v. Furber*, 3 Ch. D. 285; *Re Wolstenholme*, 29 W. R. 414; 43 L. T. N. S. 752.]

(*f*) *Graves v. Dolphin*, *Snowdon v. Dales*, *Brandon v. Robinson*, *ubi supra*; *Bird v. Johnson*, 18 Jur. 976.

¹ **Restraint of Alienation.**—A trust may not be created in which the equitable estate is not to be alienated or charged with the debts of the *cestui que trust*; *Blackstone Bank v. Davis*, 21 Pick. 43; *Daniels v. Eldredge*, 125 Mass. 356; *Sparhawk v. Cloon*, 125 Mass. 263; that the equitable estate is susceptible of alienation, and is liable to the debts of the *cestui que trust*, has been held in some cases in America; *Williams v. Thorn*, 70 N. Y. 270; *McIlvaine v. Smith*, 42 Mo. 45; *Easterly v. Keney*, 36 Conn. 18; *Tillinghast v. Bradford*, 5 R. I. 205; *Mebane v. Mebane*, 4 Ired. Eq. 131; *Smith v. Moore*, 37 Ala. 327; while in others the power of alienation is not regarded as a necessary

cestui que trust was intended to take a vested interest, the mode in which, or the time when, the *cestui que trust* was to reap the benefit, is perfectly immaterial, and the entire interest may either be disposed of by the act of the *cestui que trust*, or may enure for the benefit of his creditors by operation of law on his bankruptcy. Thus, if the trust be to apply a fund for a person's "support, clothing and maintenance" (g), or to pay the interest of *a fund [*99] to a person for life "at such times and in such manner as the trustees shall think proper" (a), or "from time to time as and when it shall become due and payable" (b), or "in such smaller or larger portions, at such times immediate or remote, and in such way and manner as the trustees shall think best" (c), the discretion of the trustees is determined by the bankruptcy of the *cestui que trust*, and the entirety of the life estate enures for the benefit of the creditors. Even where the trustees were directed to pay the interest of a sum "to A. for life, or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise," and so that A. should not have any right, title, claim, or demand other than the trustees should think proper; and after A.'s decease, to pay the interest to his widow for her life, and after her decease to assign the principal and "all savings or accumulations of interest, if any," to the children, the Court thought, that, taking the whole instrument together, the trustees had no

(g) *Youngehusband v. Gisborne*, 1 Coll. 400.

(b) *Graves v. Dolphin*, 1 Sim. 66.

(a) *Green v. Spicer*, 1 R. & M. 395.

(c) *Piercy v. Roberts*, 1 M. & K. 4.

incident to *cestui que trust's* interest, and the settlor is said to be able to tie up the estate as he will; *Hyde v. Woods*, 94 U. S. 523; *Nichols v. Eaton*, 91 U. S. 716; *Campbell v. Foster*, 35 N. Y. 381; *White v. White*, 30 Vt. 338; *Shankland's App.* 47 Pa. St. 113. If a trust is created for particular purposes and is consistent with the rule of perpetuities, it will be executed without interference; *Loring v. Loring*, 100 Mass. 340; *Blackstone Bank v. Davis*, 21 Pick. 42; *Cole v. Littlefield*, 35 Me. 439; *Wetmore v. Truslow*, 51 N. Y. 338; *Genet v. Beekman*, 45 Barb. 382; *Wells v. McCall*, 64 Pa. St. 207; *Chase v. Chase*, 2 Allen, 101; as if a trust is made for the support of one and wife and children; *Hall v. Williams*, 120 Mass. 344, which case see for effect of insolvency; also *Nichols v. Eaton*, 91 U. S. 716. For a learned and elaborate discussion of the whole question, see Gray's *Restraints on Alienation*.

power to withhold and accumulate any portion of the interest during the life of A., and therefore, on his bankruptcy, the assignees became absolutely entitled (*d*). The question to be asked in these cases is, On the decease of the *cestui que trust* would his executor have a right to call upon the trustees retrospectively to account for the arrears? (*e*). If he would, then the creditors are prospectively entitled to the payments in *futuro*.

13. **Trusts for maintenance, &c.** — But where a trust is not exclusively for the benefit of the bankrupt, but of the bankrupt and another person, the creditors will, of course, take only so much as was intended for the bankrupt. Thus where real and personal estate was vested by a marriage settlement in trustees upon trust to apply the annual produce thereof “for the *maintenance and support* of A. B. his *wife and children*, if any, or otherwise, if they thought proper, to permit the same to be received by A. B. for his life,” and A. B. became bankrupt, leaving a wife but no children, the Master of the Rolls said, “There could be no doubt of the intention of the settlement, that the wife should be supported out of the property, and he was of opinion that so long as the wife and children were maintained by A. B., the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were maintained; that the assignees took everything, subject to what was proper to be allowed for the maintenance of the wife and children, and that it must be referred to [*100] * the Master to settle a proper allowance” (*a*). And

where trustees have an arbitrary power of applying or not applying a fund for the benefit of the bankrupt, or of applying the fund in the alternative either for the benefit of the bankrupt or of another person, the bankruptcy will have no effect upon the power (*b*). Thus, where a fund was

(*d*) *Snowdon v. Dales*, 6 Sim. 524.

(*e*) See *Re Sanderson's Trust*, 3 K. & J. 497.

(*a*) *Page v. Way*, 3 Beav. 20.

(*b*) See *Chambers v. Smith*, 3 App. Cas. 795, 808, where Lord O'Hagan observed, “If the debtor have a

vested property and an absolute claim they will of course pass from him; but if the property and the claim are subject to conditions and liable to be affected by the discretionary action of other people, the creditor cannot escape the fulfilment of the conditions

given to trustees upon trust to apply the whole or *such part* of the interest as they should think fit during the life of A., for his *support and maintenance*, and for no other purpose, it was held that nothing passed to the assignees (c). So where freehold and leasehold property was vested in trustees upon trust for A. B. for life; but if he became bankrupt or insolvent the trustees were, during his life, to apply the annual produce "in and towards the *maintenance, clothing, lodging, and support* of A. B. and his then present or any future *wife and his children*, or *any of them* as the trustees should at their distinction think proper," and A. B. became insolvent, having a wife and children, it was argued that the power in the trustees was destroyed by the insolvency, and that the life estate vested in the assignee; but Vice-Chancellor Knight Bruce held that the trustees had a right under the power to appoint in favour of the insolvent, his wife and children, or any of them in exclusion of any other of them, but that any benefit which the insolvent might take would belong to the assignee (d). And even if the trust be for the maintenance of the bankrupt *and his wife and his children* in such manner as the trustees may think fit, it seems that the trustees may so exercise the power that there shall be nothing tangible for the creditors to lay hold of. Thus where a residuary personal estate was given to the testator's son for life, but if he did any act whereby the interest vested in him would become forfeited to others, the trustees were to apply the annual produce "for the *maintenance and support* of the son, and *any wife and child or children* he might have, as the trustees should in their discretion think fit," and the son became bankrupt, having a wife and children, the Vice-Chancellor of England said "That nothing was of necessity to be *paid*, but the property was to be *applied*; and there might be a maintenance of the son, and of the wife and * children, without their receiving any money [*101] at all: that the trustees might take a house for their

or deny the effect of that exercise of the discretion which would have bound the debtor."]

(c) *Twopeny v. Peyton*, 10 Sim.

487; and see *Re Sanderson's Trust*, 3 K. & J. 497.

(d) *Lord v. Bunn*, 2 Y. & C. Ch. Ca.

98; *Holmes v. Penney*, 3 K. & J. 90.

lodging, and give directions to tradesmen to supply the son and the wife and children with all that was necessary for maintenance, and if so the assignees were not entitled to anything" (a). But if there be a power not arbitrary but imperative to apply for the benefit of the bankrupt and another, and the trustees refuse to exercise the power, so that a simple trust arises, the creditors will take a moiety (b), and if by the death of the other person the bankrupt becomes the only object of the power, the creditors will take the whole (c).

14. **Limitation over on alienation.**— But though a person cannot put a restraint upon alienation, or exclude the rights of creditors, he may settle property upon A. *until* alienation, bankruptcy, or insolvency, with a limitation over to B. on the happening of either of those events; or he may give real or personal estate to A. for *life* (d), with a *proviso* that on alienation, bankruptcy, or insolvency (e), it shall shift over to B., and where property was by an instrument dated in 1862, limited to A. for life "or until he should be outlawed or declared bankrupt or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors," his interest was held to cease on the presentation of a petition for liquidation under the Bankruptcy Act, 1869, by a firm of which he was a member, followed by acceptance by the creditors of a composition.¹ And if the trust be for A. for life, remainder to B. for life, or until bank-

(a) *Godden v. Crowhurst*, 10 Sim. 642; and see *Kearsley v. Woodcock*, 3 Hare, 185; *Wallace v. Anderson*, 16 Beav. 533; *In re Landon's Trusts*, 40 L. J. N. S. Ch. 370.

(b) *Ribbon v. Norton*, 2 Beav. 63.

(c) *Wallace v. Anderson*, 16 Beav. 533.

(d) *Shee v. Hale*, 13 Ves. 404; *Cooper v. Wyatt*, 5 Mad. 482; *Yarnold v. Moorhouse*, 1 R. & M. 364; *Lockyer v. Savage*, 2 Stra. 947; *Stephens v. James*, 4 Sim. 499; *Ex parte Hinton*, 14 Ves. 598; *Lewes v. Lewes*, 6 Sim. 304; *Ex parte Oxley*, 1 B. &

B. 257; *Stanton v. Hall*, 2 R. & M. 175; *Oldham v. Oldham*, 3 L. R. Eq. 404; *Montefiore v. Behrens*, 35 Beav. 95; *Hammonds v. Barrett*, 21 L. T. N. S. 321; 17 W. R. 1078; *Billson v. Crofts*, 15 L. R. Eq. 314; *Re Aylwin's Trusts*, 16 L. R. Eq. 585; [*Hatton v. May*, 3 Ch. D. 148; *Re Bedson's Trusts*, 25 Ch. D. 458; affirmed 28 Ch. D. 523. *Joel v. Mills*, 3 K. & J. 458;] and see *Rochford v. Hackman*, 9 Hare, 475; *Sharp v. Cosserat*, 20 Beav. 470.

(e) As to what is insolvency, see *Re Muggeridge's Trust*, Johns. 625.

¹ *Nixon v. Verry*, 29 Ch. D. 196.

ruptcy, and B. becomes bankrupt in the lifetime of A., the clause takes effect (*f*). [And if the trust be for A. for life and the proviso that on his charging or incumbering the property or becoming bankrupt, the gift to him shall be absolutely forfeited, and the subsequent gifts accelerated, the proviso will be good, although there is no person capable of taking under the subsequent gifts (*g*). But a gift of real estate to A. her heirs and assigns, subject to a proviso determining her estate, in the event of her bankruptcy, and limiting the estate over, in that event, to other persons is an absolute gift to A., and the proviso is void for repugnancy (*h*). The general opinion (*i*) has until recently been that real or personal estate might be given to a person absolutely with a partial restraint *on the power [*102] of alienation, as for instance a condition against alienation within a particular period, but in a late case *Pearson, J.* held such a condition to be void (*a*).]

15. But a clause divesting the property on bankruptcy is not brought into operation by a deed of inspectorship (*b*), and a like clause on "alienation" will extend only to a disposition by the act of the party, and not to a transfer by operation of law, as *bankruptcy* (*c*), unless it can be collected from the context that the term was intended by the settlor to have so wide a signification (*d*); and a warrant of attorney to enter up a judgment which is followed by a charging order will not be an act of alienation, unless the charge was immediately in the contemplation of the parties at the time

(*f*) *Re Muggeridge's Trust*, John. 625.

(*g*) *Hurst v. Hurst*, 21 Ch. D. 278; *Doe v. Eyre*, 5 C. B. 713; *Robinson v. Wood*, 27 L. J. N. S. Ch. 726.]

(*h*) *Re Machu*, 21 Ch. D. 838.]

(*i*) *Large's case*, 2 Leon. 82; *Churchill v. Marks*, 1 Coll. 441; *Kearsley v. Woodcock*, 3 Hare, 185; *Co. Lit.* 223a; *Shep. Touch.* 129; *Re Macleay*, 20 L. R. Eq. 186, and cases there cited; *Jarm. on Wills*, 4th ed. vol. 2, p. 18; *Williams on Settlements*, 134; *Tudor's Real Prop. Cases*, 3d ed. 972, &c.]

(*a*) *Re Rosher*, 26 Ch. D. 801.]

(*b*) *Montefiore v. Enthoven*, 5 L. R. Eq. 35.

(*c*) *Lear v. Legget*, 2 Sim. 479; S. C. 1 R. & M. 690; *Whitfield v. Prickett*, 2 Keen, 608; *Wilkinson v. Wilkinson*, Sir Geo. Coop. R. 259; and see S. C. 3 Sw. 528. [But as to a bankruptcy on the debtor's own petition, see *Re Amherst's Trusts*, 13 L. R. Eq. 464.]

(*d*) *Dommett v. Bedford*, 6 T. R. 684; *Cooper v. Wyatt*, 5 Mad. 482; [see *Ex parte Eyston*, 7 Ch. D. 145.]

of giving the warrant (*e*); and [even under the law prior to the Married Women's Property Act, 1882] the marriage of a *feme* was not an alienation of a *chose en action* to the extent of her equity to a settlement out of it (*f*); but where real estate was held in trust for A. and her assigns for her life, with remainder over, with a proviso, that, if she did anything whereby she might lose the control over the income, the life estate should "cease as fully as it would by her actual decease," and she married, so that the husband obtained the control over the income, the limitation over to the remainderman took effect (*g*). Where the forfeiture is to arise on bankruptcy, no forfeiture is incurred by a bankruptcy which is afterwards annulled, provided the annulment be effected before any beneficial interest could have come to the hands of the assignee (*h*); and where the clause was against "anticipating or otherwise assigning or encumbering" the annual proceeds, and the *cestui que trust* assigned, so far as he lawfully could without forfeiture, the arrears already [*103] *accrued, but not the future income, it was held that the assignment being confined to the arrears was valid (*a*); and a power of attorney to receive the income and a charge upon the income will not be a forfeiture, unless it can be proved that the power of attorney and charge were meant to be applied to future income, and not to be confined to arrears already accrued (*b*); and an assignment in *general* words will not comprise a property which if attempted to be assigned would become forfeited (*c*).

(*e*) *Avison v. Holmes*, 1 J. & H. 530; and see *Barnett v. Blake*, 2 Dr. & Sm. 117; *Montefiore v. Behrens*, 35 Beav. 95.

(*f*) *Bonfield v. Hassell*, 32 Beav. 217.

(*g*) *Craven v. Brady*, 4 L. R. Ch. App. 296. [But see now 45 & 46 Vict. c. 75.]

(*h*) *White v. Chitty*, 1 L. R. Eq. 372. This case went to the verge, but in *Lloyd v. Lloyd*, 2 L. R. Eq. 722, the Court went even further. See also *Re Parnham's Trust*, 13 L. R. Eq. 413; [as decided by Lord Romilly,

M. R.; and the same case subsequently brought before Sir G. Jessel, M. R. 46 L. J. N. S. Ch. 80, when he came to a decision directly opposed to that of Lord Romilly;] *Trappes v. Meredith*, 9 L. R. Eq. 229; [*Samuel v. Samuel*, 12 Ch. D. 152; *Ancona v. Waddell*, 10 Ch. D. 157; *Hurst v. Hurst*, 21 Ch. D. 278;] *Robertson v. Richardson*, 30 Ch. D. 623.

(*a*) *Re Stulz's Trusts*, 4 De G. M. & G. 404; S. C. 1 Eq. Rep. 334.

(*b*) *Cox v. Bockett*, 35 Beav. 48.

(*c*) *Re Waley's Trust*, 3 Eq. Rep. 380; and see *Fausset v. Carpenter*, 2

[Where, however, there was a residuary gift to A. for life, with remainder to B., with a general provision against alienation by B. in A.'s lifetime, and a mortgage was made by B., "subject, nevertheless, to the said proviso or condition in the will contained," it was held by the late M. R. that there was no forfeiture inasmuch as the restriction meant in substance "I charge if I can charge, and I do not if I cannot charge," and consequently as B. had no power to charge the property was never charged at all (*d*). But if a memorandum of charge be made and accepted by the person in whose favour it is made, it will be effectual to create a forfeiture although no claim is made under it, and a disclaimer of the charge after it has once been accepted will not avail to prevent the forfeiture (*e*).

An assignment of the assignor's life estate to trustees for the benefit of the assignor, until he otherwise directs, has been held not to create a forfeiture so long as no direction is given by the assignor inconsistent with his actual enjoyment of the life estate (*f*).

Where the forfeiture of an annuity was to arise on the annuitant doing or suffering anything which would deprive him of the right to receive the annuity, a garnishee order served on the trustees was held to create a forfeiture (*g*).]

16. *Insolvency*. — *Insolvency*, while it existed, was not a process *in invitum*, but the act of the insolvent himself (except it was on the petition of a creditor (*h*)), and therefore came within the meaning of a restraint against "alienation" (*i*). But a mere declaration of insolvency to lay a foundation for a bankruptcy was not an alienation or attempt at alienation (*j*). Under The Bankruptcy Act, * 1869, a petition for liquidation was a voluntary part- [*104]

Dow & Cl. 232; 5 Bligh, N. S. 75; St. Leonard's H. L. cases, 76.

[(*d*) Samuel v. Samuel, 12 Ch. D. 152.]

[(*e*) Hurst v. Hurst, 21 Ch. D. 278.]

[(*f*) Lockwood v. Sikes, 51 L. T. N. S. 562.]

[(*g*) Bates v. Bates, W. N. 1884, p. 129.]

(*h*) 1 & 2 Vict. c. 110, s. 36; see Pym v. Lockyer, 12 Sim. 394.

(*i*) Shee v. Hale, 18 Ves. 404; Brandon v. Aston, 2 Y. & C. Ch. Ca. 24; Churchill v. Marks, 1 Coll. 441; Martin v. Margham, 14 Sim. 230; Townsend v. Early, 34 Beav. 23.

(*j*) Graham v. Lee, 23 Beav. 388.

ing with the bankrupt's interest (a); [and a debtor's petition under The Bankruptcy Act, 1883, will it is conceived have the same effect.]

17. A person cannot settle *his own* property on *himself*, with a limitation over in the event of his own bankruptcy (b). But a husband may on his marriage thus settle a fund of his own to the extent of the wife's fortune received by him, for this, though apparently a settlement by him, is in substance a settlement of the money advanced by the wife (c); and, indeed, a person may on marriage, without regard to the wife's fortune, limit his own property to himself for life or until *alienation*, and then over in favour of the wife or children, for they are purchasers for value and there is no fraud upon any one (d).

18. *Direction to purchase presentation for a particular person.*—It is not unusual to find a clause in a *will* directory to trustees to purchase a *presentation* in favour of some particular object; but, it seems, if the purchase be made with the *intention* of presenting the *cestui que trust*, though the patron himself was ignorant of the purpose in view (e), it falls within the enactment against simony (f). A patron is forbidden to present for money, either *directly* or *indirectly*; and, the object being determined upon at the time of the purchase, the construction put upon the transaction by the Court is, that the patron presents *indirectly* by selling to a person who purchases with the sole intention of presenting.

(a) *Re Amherst's Trusts*, 13 L. R. Eq. 464.

(b) *Higinbotham v. Holme*, 19 Ves. 88; *Ex parte Hill*, 1 Cooke's Bank. Law, 291; *Ex parte Bennet*, ib. 293; *In re Murphy*, 1 Sch. & Lef. 44; *In re Meagham*, ib. 179; *Ex parte Hodgson*, 19 Ves. 206; *Re Casey's Trust*, 3 Ir. Ch. Rep. 419, 4 Ir. Ch. Rep. 247; *Clarke v. Chambers*, 8 Ir. Ch. Rep. 26; *Murphy v. Abraham*, 15 Ir. Ch. Rep. 371.

(c) *Ex parte Cooke*, 8 Ves. 353; *Higginson v. Kelly*, 1 B. & B. 252; *Ex parte Verner*, ib. 260; *In re Meagham*, 1 Sch. and Lef. 179; *Ex parte Hodgson*, 19 Ves. 206; [*Corr v. Corr*,

3 L. R. Ir. 435, 438; *Re Callan's Estate*, 7 L. R. Ir. 102.] but see *Ex parte Hill*, 1 Cooke's Bank. Law, 291, and compare *Ex parte Hodgson*, 19 Ves. 208.

(d) *Knight v. Browne*, 7 Jur. N. S. 894; *Brooke v. Pearson*, 27 Beav. 181; and see *Phipps v. Lord Ennismore*, 4 Russ. 181; *Synge v. Synge*, 4 Ir. Ch. Rep. 337; [*Re Callan's Estate*, 7 L. R. Ir. 102.]

(e) *King v. Trussel*, 1 Sid. 329.

(f) *Kitchen v. Calvert*, Lane, 102, per Baron Snig; *Winchcombe v. Pulleston*, Noy, 25, per Lord Hobart; *Godbolt*, 390; and see *Fearn's P. W.* 404; but see *Fox v. Bishop of Ches-*

19. **Purchase of Advowson.**—The purchase of an *advowson* upon the footing that immediate possession shall be given is clearly simoniacal; and yet, notwithstanding the stringent words of the Acts against simony, and of the declaration to be made by the clerical purchaser, such transactions are of too frequent occurrence. As any stipulation *for the resignation of the present incumbent [*105] would be illegal and could not be enforced, the purchaser is obliged to rely upon the honour of the vendor, the purchase money in the meantime being impounded in the hands of trustees, to be paid over upon the intentions of the parties being carried into effect.

20. **Insurances for life.**—It has been ruled that the statute relating to *insurances* on lives does not prohibit an insurance on the life of A. in the name of B. *upon trust for A.* when both names appear upon the policy (a). But an insurance on the life of A. by B. a creditor, not on his own account, but as a trustee for C., who has no interest in the life, would, it is considered, be void.

21. **Income tax.**—The income tax Act (b) avoids all contracts or agreements by which one person undertakes to pay the *income tax* of another; but this does not prevent a settlor from vesting an estate in trustees upon trust to pay “all taxes affecting the lease” (meaning inclusively the income tax), and subject thereto for A. for life (c).

22. **Splitting votes.**—Fictitious, fraudulent, or collusive conveyances for the purpose of *creating votes* for members of parliament, as when the conveyance is in form only, and there is a private arrangement between the parties that no interest shall pass, are null and void; but if A., *bonâ fide* and without any secret understanding in derogation of the deed, though for the purpose of multiplying votes, convey to B. in trust for a number of persons as tenants in common, that

ter, 6 Bing. 1; *Cowper v. Mantell*, 22 Beav. 231; *Id. qu.*

(a) *Collett v. Morrison*, 9 Hare, 162.

(b) 5 & 6 Vict. c. 35, s. 73.

(c) *Lord Lovat v. Duchess of Leeds* (No. 1), 2 Dr. & Sm. 62; *Festing v. Taylor*, 32 L. J. N. S. 41; 3 B. & S. 217; [*Re Bannerman's Estate*, 21 Ch. D. 105.]

they may thereby acquire a qualification, the deed is unimpeachable (*d*).

23. **Immoral trusts.**—Trusts adverse to the foundation of all *religion* and subversive of all *morality* are, of course, void, and not enforceable by the Court (*e*).

[24. **Superstitious purposes.**—Trusts for superstitious purposes, as for saying masses or requiems for the souls of the dead, are void (*f*).]

25. **Consequences to the settlor of creating a trust with an unlawful purpose.**—Where a trust is created for an unlawful and fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited, nor will assist the settlor to recover the estate (*g*).

[*106] * 26. **Property settled with an unlawful purpose may be recovered by persons claiming under the settlor.**—But a distinction was taken by Lord Eldon between a bill filed by the author of the fraud himself, and by a person taking through him, but not a party to the fraud (*a*), and this distinction is supported by other authority (*b*). And the settlor himself may take proceedings for recovering the property, where the illegal trust failed to take effect, so that no

(*d*) *Thornley v. Aspland*, 2 C. B. 160; *Alexander v. Newman*, 2 C. B. 122; *May v. May*, 33 Beav. 81; and see *Childers v. Childers*, 3 K. & J. 310; 1 De G. & J. 482; *Ashworth v. Hopper*, 1 C. P. D. 178.

(*e*) See *Thornton v. Howe*, 31 Beav. 14.

[(*f*) *West v. Shuttleworth*, 2 My. & K. 684; *Heath v. Chapman*, 2 Dr. 417; *Re Blundell's Trusts*, 30 Beav. 360; *Re Fleetwood*, 15 Ch. D. 694; *Dorrian v. Gilmore*, 15 L. R. Ir. 69; and see *Re Michel's Trusts*, 28 Beav. 39.]

(*g*) *Cottington v. Fletcher*, 2 Atk. 555; see Lord Eldon's remarks in *Muckleston v. Brown*, 6 Ves. 68; and see *Chaplin v. Chaplin*, 3 P. W. 233; *Hamilton v. Ball*, 2 Ir. Eq. Rep. 191; *Groves v. Groves*, 3 Y. & Jer. 163; *Ottley v. Browne*, 1 B. & B. 360; *Davies v. Otty* (No. 2), 35 Beav. 208;

Haigh v. Kaye, 7 L. R. Ch. App. 473; *Barton v. Muir*, 6 L. R. P. C. 134; [*Re Great Berlin Steamboat Company*, 28 Ch. D. 616.] In *Wilkinson v. Wilkinson*, 1 Y. & C. Ch. Ca. 657, the words "*all other the children he might thereafter have by her*," were probably held to mean legitimate children in case the settlor married the person named, who, it is presumed, had died before the suit.

(*a*) *Muckleston v. Brown*, 6 Ves. 68.

(*b*) *Matthew v. Hanbury*, 2 Vern. 187; *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Joy v. Campbell*, 1 Sch. & Lef. 328, see 335, 339; *Miles v. Durnford*, 2 Mac. & G. 643; and see *Phillpotts v. Phillpotts*, 10 C. B. 85; *Groves v. Groves*, 3 Y. & Jer. 163; *Childers v. Childers*, 3 K. & J. 310, 1 De G. & Jon. 482. See a classification of the cases in reference to co-

trust arose, and, the trustees having paid no consideration, the equitable interest resulted (c).

27. **There must be a cestui que trust.** — A trust must be for the benefit of *some person or persons*, and if this ingredient be wanting, as in a trust for keeping up family tombs, the trust is void (d). [But a direction to an executor to apply a sum of money in erecting a monument to a person already deceased is valid (e) and] a trust for keeping in repair a painted window or monument in a church is valid as a charitable gift, for it is for the interest of the public that the ornaments of the church should not be allowed to fall into decay (f).

28. **Personalty bequeathed to a charity.** — If a testator bequeath his personalty generally to such charitable purposes as the trustees should think proper, the trustees can exercise the *power* as to the *pure personalty* (g).

But the trustees cannot under the power apply the impure personalty to charitable institutions authorized to hold property of that description, unless the testator has indicated in the will that charities of that nature are among the objects intended to be benefited.¹

[29. **Trust partly for a lawful and partly for an unlawful purpose.** — If property be given upon trust to apply part thereof for an unlawful purpose, and to hold or apply the residue for a lawful purpose, then, unless the amount intended to be applied for the unlawful purpose can be

habitation bonds, 3 Mac. & G. note (c), page 100.

(c) Symes v. Hughes, 9 L. R. Eq. 475; Manning v. Gill, 13 L. R. Eq. 485; Haigh v. Kaye, 7 L. R. Ch. App. 469; Dawson v. Small, 18 L. R. Eq. 114; Taylor v. Bowers, W. N. 1876, p. 67.

(d) Rickard v. Robson, 31 Beav. 244; Lloyd v. Lloyd, 2 Sim. N. S. 255; Thompson v. Shakespeare, Johns. 612, 1 De Gex, F. & J. 399; Fowler v. Fowler, 33 Beav. 616; Fisk v. Attor-

ney-General, 4 L. R. Eq. 521; Hunter v. Bullock, 14 L. R. Eq. 45; Dawson v. Small, 18 L. R. Eq. 114; [Re Williams, 5 Ch. D. 735; Re Birkett, 9 Ch. D. 576; see Gott v. Nairne, 3 Ch. D. 278.]

[(e) Mussett v. Bingle, W. N. 1876, p. 170.]

(f) Hoare v. Osborne, 1 L. R. Eq. 585; Re Rigley's Trust, 15 W. R. 190.

(g) Lewis v. Allenby, 10 L. R. Eq. 668; Re Clark, 52 L. T. N. S. 406.

¹ Re Clarke, 52 L. T. N. S. 406; 54 L. J. Ch. 1080; Lewis v. Allenby, 10 L. R. Eq. 668.

[*107] ascertained, the whole gift will fail (*h*); * but the fact that the amount to be applied for the unlawful purpose has not been *expressly* stated in the gift will not make the whole gift void, and the Court will, if it be practicable, ascertain the amount which would have satisfied the unlawful purpose, and hold the gift good as to the residue (*a*).]

[(*h*) *Chapman v. Brown*, 6 Ves. 404; *Limbrey v. Gurr*, 6 Mad. 151; *Cramp v. Playfoot*, 4 K. & J. 479; *Fowler v. Fowler*, 33 Beav. 616. But see *Re Williams*, 5 Ch. D. 735; *Re Birkett*, 9 Ch. D. 576.]

[(*a*) *Mitford v. Reynolds*, 1 Phil. 185; *Re Rigley's Trust*, 15 W. R. 190; *Fisk v. Attorney-General*, 4 L. R. Eq. 521; *The Magistrates of Dundee v. Morris*, 3 Macq. 134; and see *Dawson v. Small*, 18 L. R. Eq. 114; *Hunter v. Bullock*, 14 L. R. Eq. 45; *Re Williams*, 5 Ch. D. 735; *Champney v. Davy*, 11 Ch. D. 949; *Re Birkett*, 9 Ch. D. 576. It should, however, be pointed out that in *Fisk v. Attorney-General*, *Dawson v. Small*, *Hunter v. Bullock*, *Re Williams*, and *Re Birkett*, *ubi sup.*, all of which were cases of trusts for the maintenance of family tombs out of the income of a fund and for the application of the surplus for a lawful purpose, the trust for the lawful purpose was held to apply to the *whole* income and not merely to the *surplus* after ascertaining what would have been required for the unlawful purpose. It is difficult to see upon what principles these cases rest; but it is submitted that the grounds upon which they are put do not affect the proposition in the text. Thus, in *Fisk v. Attorney-General*, the case was argued on the footing that the whole fund was given for the lawful purpose

charged with a portion for an unlawful purpose, and the charge failing, the gift of the whole for the lawful purpose was good; and this would seem to have been the view adopted by V. C. Wood, for he observed, p. 527: "I think I ought, in this instance (if the gift of the residue had been exclusive of the amount required for the repair of the grave), to have ascertained the amount required for the void purpose, but the better construction is, that the whole of the gift is to be taken by the rector and church-wardens."

So again in *Hunter v. Bullock* and *Dawson v. Small*, both before V. C. Bacon, the trust for keeping up the tombs was treated as being merely honorary: that is, "an obligation either to be performed or not, as the persons to whom the custody of the money was given thought fit," and the gift for the lawful purpose was held to be "certain in amount" (*i.e.*, of the whole income), "subject only to the fulfilment of the honorary trust."

In *Re Williams* and *Re Birkett*, V. C. Malins and M. R. followed the previous decisions; M. R. in the latter case (in which *Re Rigley's Trusts* was not mentioned), intimating that had the case been unfettered by authority, he should have arrived at a different conclusion.]

IN WHAT LANGUAGE A TRUST MUST BE DECLARED.

A PERSON may declare a trust either directly or indirectly: the former by creating a trust *eo nomine*, in the form and terms of a trust; the latter, without affecting to create a trust in words, by evincing an intention, which the Court will effectuate through the medium of an implied trust (1).

SECTION I.

OF DIRECT OR EXPRESS DECLARATIONS OF TRUST.

1. **General rule.** — In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word “heirs,” and an equitable entail without the words “heirs of the body” (a), provided words be used which though not technical *are yet [*109]

(a) See Shep. Touch. by Preston, 106.

(1) **Distinction between Implied Trusts, Trusts by Operation of Law, and Constructive Trusts.** — The terms *Implied Trusts*, *Trusts by Operation of Law*, and *Constructive Trusts* appear from the books to be almost synonymous expressions; but for the purposes of the present work the following distinctions, as considered the most accurate, will be observed: — An *implied* trust is one declared by a party not directly, but only by implication; as where a testator devises an estate to A. and his heirs, *not doubting* that he will thereout pay an annuity of £20 per annum to B. for his life, in which case A. is a trustee for B. to the extent of the annuity. *Trusts by operation of law* are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity, and are either — 1. *Resulting trusts*, as where an estate is devised to A. and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; or, 2. *Constructive trusts*, which the Court elicits by a construction put upon certain *acts* of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease.

popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument.¹

¹ **EXPRESS TRUSTS. — Formality.** — No particular formality or express words are necessary in the creation of an express trust; *Urann v. Coates*, 109 Mass. 581; *Fisher v. Fields*, 10 Johns. 496; *Giddings v. Palmer*, 107 Mass. 270; *Perry on Trusts*, § 82; and former note relating to formality, page 56; the same rules apply to equitable as to legal estates; *Noble v. Andrews*, 37 Conn. 346; and technical words receive the same meaning; *McPherson v. Snowdon*, 19 Md. 197; *Carter v. Montgomery*, 2 Tenn. Ch. 216; *Mullany v. Mullany*, 4 N. J. Eq. 16; the rule in *Shelley's* case has been abolished by statute, in very many of the states, and was always an arbitrary rule for the disposition of property, and not one for executing the intention of the settlor; *Yarnall's App.* 70 Pa. St. 340; *Doebler's App.* 64 Pa. St. 9; *Hileman v. Bonslaugh*, 1 Harris, 351; *Coape v. Arnold*, 2 Sm. & Giff. 311; the above interpretation of technical words, and the rule in *Shelley's* case, apply only to executed trusts; *Imlay v. Huntington*, 20 Conn. 162; *Neves v. Scott*, 13 How. 268; *Wiley v. Smith*, 3 Kelly, 551; *Porter v. Doby*, 2 Rich. Eq. 49; *Wood v. Burnham*, 26 Wend. 9; *Carradine v. Carradine*, 33 Miss. 698; *Cushing v. Blake*, 30 N. J. Eq. 680. An express trust was created by deed "upon trust and confidence and for sole use and benefit of" wife for life, remainder to children; *McCarthy v. McCarthy*, 74 Ala. 546; a written agreement by officers of a mining company to give a party a certain share in mining land for services is good; *Compo v. Jackson Iron Co.* 49 Mich. 39; likewise a conveyance of land in trust to rent and sell and pay the proceeds to grantor for life, and then to those named; *Heermans v. Schmaltz*, 10 Biss. C. C. 323; Effect of *habendum* clause in deed; *McElroy v. McElroy*, 113 Mass. 509; trust created by *nota bene* after deed; *Ivory v. Burns*, 56 Pa. St. 300; by deed on condition; *Baldwin v. Atwood*, 23 Conn. 387; by a deposit in trust for L; *Weber v. Weber*, 9 Daly (N. Y.) 211; *Smith v. Speer*, 34 N. J. Eq. 336; widow set apart a portion of money received from husband's life insurance for her daughter, orally, and then purchased land. A trust arose for the daughter; *Cobb v. Knight*, 74 Me. 253; an instrument gave, granted and conveyed to grantee to hold to her use and benefit, reserving the right to manage and collect, thereby creating an irrevocable trust; *Walker v. Crews*, 73 Ala. 412.

For cases where trust was created, see *Schlessinger v. Mallard*, 70 Cal. 326; *Corse v. Leggett*, 25 Barb. 389; *Pratt v. Thorton*, 28 Me. 355; *Fletcher v. Derrickson*, 3 Bosw. 181; *Conway v. Kinsworthy*, 21 Ark. 9; *Noble v. Morris*, 24 Ind. 478; *contra*, *Bacon v. Ransom*, 139 Mass. 117; *Bibb v. Hunter*, 79 Ala. 351; *Fussell v. Hennessy*, 14 R. L. 550; *White v. Farley*, 81 Ala. 563.

As to establishing an express trust by parol, see *Hellman v. McWilliams*, 70 Cal. 449; *Taylor v. Sayles*, 57 N. H. 465; *Columbus & Co. v. Braden*, 110 Ind. 558; *Green v. Cates*, 73 Mo. 115; *Belknap v. Caldwell*, 82 Ind. 270; *Cade v. Davis*, 96 N. C. 139; *Kane v. O'Connors*, 78 Va. 76; *Preston v. Casner*, 104 Ill. 262; *Hollinshead's App.* 103 Pa. St. 158; *Link v. Link*, 90 N. C. 235; *Cain v. Cox*, 23 W. Va. 594; *Gilman v. McArdle*, 99 N. Y. 451; *Crouse v. Frothingham*, 97 N. Y. 105; *Grace v. Hanks*, 57 Tex. 14.

Executed and executory trusts. — If a will or deed set forth a trust so definitely that it only remains for the trustee to execute it as directed, it is termed an executed trust, and is subject to the rules controlling legal estates; but if a trustee receive a trust which is subject to future events or contingencies, and the directions regarding it are informal and incomplete, it is called an

2. **Equitable fee may be devised without the word heirs applied to it.**—**Case of a deed.**—If an estate be *devised* unto and to the use of A. *and his heirs*, upon trust for B., without executory trust, because it must be shaped or adapted to the intentions of the testator or settlor; *City Phila. v. Girard*, 45 Pa. St. 9; 84 Am. Dec. 470; *Cushing v. Blake*, 30 N. J. Eq. 689; *Edmundson v. Dyson*, 2 Kelly, 307; *Schley v. Lyon*, 6 Ga. 530; *Mullany v. Mullany*, 40 N. J. Eq. 16. It is to be noticed of executory contracts that the intention of the settlor governs; *Wood v. Burnham*, 6 Paige, 513; and there must be some opportunity for an exercise of judgment in determining his intention; *McElroy v. McElroy*, 113 Mass. 509; the beneficiary is not yet clothed with an equitable title, but has a right to have some act done which will vest in him such title; *Nicoll v. Ogden*, 29 Ill. 323; 61 Am. Dec. 311.

A trust is executed when no act is necessary to give it effect, and the trust is fully and finally declared in the instrument, in which case the consideration is not material; *Massey v. Huntington*, 118 Ill. 80; *Buchanan v. Howard*, 3 Tenn. Ch. 206; where an active duty is imposed on the trustee, the trust is not executed until the duty has been, or may have been, performed; *Sprague v. Sprague*, 13 R. I. 701; or until the full beneficial enjoyment rests; *Kay v. Scates*, 37 Pa. St. 81.

A trust is executory where something remains to be done by the trustee; *Schley v. Lyon*, 6 Ga. 530; such a trust will not be executed at the suit of a volunteer; *Clark v. Durand*, 12 Wis. 223; executory or imperfect trusts are only directory, and, if necessary, a Court of Equity will determine the intention of the settlor from an examination of the whole instrument; *Mullany v. Mullany*, 4 N. J. Eq. 16; an executory agreement to create a trust will not be enforced; *Est. of Webb*, 49 Cal. 542; or an unexecuted trust if without consideration; *Badgley v. Votrain*, 68 Ill. 25. See, also, *Padfield v. Padfield*, 68 Ill. 210; *Boyd v. England*, 56 Ga. 598; *Eaton v. Eaton*, 35 N. J. Eq. 290; *Tanner v. Skinner*, 11 Bush, 120.

Marriage articles and settlements.—A settlement will be made according to the intention of the parties, if possible; *Allen v. Rumph*, 2 Hill. Eq. 1; *Gause v. Hale*, 2 Ired. Eq. 241. If it be of personal property, which is conveyed before marriage, it will be regarded as executed; *Tillinghast v. Coggeshall*, 7 R. I. 383. Primogeniture and preferences to the eldest son are abolished in America, and so is joint tenancy in most of the states. If a settlement does not conform to the decree in the case, the court will insist upon having it made to do so; *Temple v. Hawley*, 1 Sandf. Ch. 154; *Grout v. Van Schoonhoven*, 1 Sandf. Ch. 342; generally speaking, mere volunteers cannot seek specific performance of the articles; *Clark v. Durand*, 12 Wis. 223; *Tanner v. Skinner*, 11 Bush, 120; *Gevers v. Wright*, 3 Green. Ch. 330; *Bunn v. Winthrop*, 1 Johns. Ch. 336; *Bleeker v. Bingham*, 3 Paige, 246; but if it appears from the articles that collateral relatives may take the property, they will not be regarded as volunteers; *Dennison v. Goehring*, 7 Barr. 175; *King v. Whitely*, 10 Paige, 465; *Neves v. Scott*, 9 How. 210; overruled in 13 How. 268.

Executory trusts created by will.—In these there is no presumption as to the intention of the testator; *Robertson v. Johnston*, 36 Ala. 197; *McPherson v. Snowden*, 19 Md. 197; *Allen v. Henderson*, 49 Pa. St. 333.

An executory agreement to create a trust cannot be enforced; *Est. of Webb*, 49 Cal. 542; an executed express trust not manifested by writing is incapable of legal recognition; *Eaton v. Eaton*, 35 N. J. L. 290. An unexecuted trust, without consideration or delivery, will not be enforced; *Badgley*

any words of limitation, B. takes the equitable fee; for the whole estate passed to the trustees, and whatever interest they took was given in trust for B. (a). But if an estate be conveyed by *deed* unto and to the use of a trustee and his heirs, in trust for the settlor for life, and after his death upon trust for his children simply, without the word *heirs*, [or, in deeds executed since the 31st December, 1881, the words "in fee simple" or "in tail" (b)], the children by analogy to legal limitations take an estate for life only (c). Should *renewable leaseholds for lives* be conveyed by deed to trustees and their heirs upon trust for A., it has been held that from the nature of an estate *pur autre vie*, A. takes the absolute interest (d).

3. **Force of technical terms.** — But though technical terms be not absolutely necessary, yet where technical terms are employed they shall be taken in their legal and technical sense (e). Lord Hardwicke indeed once added the qualification, "*unless the intention of the testator or author of the trust plainly appeared to the contrary* (f)." But this position has since been repeatedly and expressly overruled, and at the present day it must be considered a clear and settled canon that a limitation in a trust, perfected and declared by

(a) *Moore v. Cleghorn*, 10 Beav. 423; affirmed on appeal, 12 Jurist, 591; *Knight v. Selby*, 3 Man. & Gr. 92; *Challenger v. Sheppard*, 8 T. R. 597; *Yarrow v. Knightly*, 8 Ch. D. 736; and see *Doe v. Cafe*, 7 Exch. Rep. 675; *Watkins v. Weston*, 32 Beav. 238; *Ryan v. Keogh*, 4 I. R. Eq. 357; *Hodson v. Ball*, 14 Sim. 558.

[(b) 44 & 45 Vict. c. 41, s. 51.]

(c) *Holliday v. Overton*, 14 Beav. 467; 15 Beav. 480; 16 Jur. 751; *Lucas v. Brandreth* (No. 2), 28 Beav. 274; *Tatham v. Vernon*, 29 Beav. 604; [*Lysaght v. M'Grath*, 11 L. R. Ir. 142; *Meyler v. Meyler*, 11 L. R. Ir. 522;] *Middleton v. Barker*, 29 L. T. N. S. 643.

(d) *McClintock v. Irvine*, 10 Ir. Ch. Rep. 481; *Brenan v. Boyne*, 16 Ir. Ch. Rep. 87; *Betty v. Elliott*, ib. 110, note; *Re Bayley*, 16 Ir. Ch. Rep. 215; [*Currin v. Doyle*, 3 L. R. Ir. 265;] and see *post*, chap. xxvii. s. 1.

(e) *Wright v. Pearson*, 1 Eden, 125, per Lord Henley; *Austen v. Taylor*, 1 Ed. 367, per *eundem*; *Synge v. Hales*, 2 B. & B. 507, per Lord Manners; *Jervoise v. Duke of Northumberland*, 1 J. & W. 571, per Lord Eldon; *Lord Glenorchy v. Bosville*, Cas. t. Talb. 19, per Lord Talbot; *Bale v. Coleman*, 8 Vin. 268, per Lord Harcourt; [*Meyler v. Meyler*, 11 L. R. Ir. 522.]

(f) *Garth v. Baldwin*, 2 Ves. 655.

v. Volrain, 68 Ill. 25; see *Padfield v. Padfield*, 68 Ill. 210. Trust is not executed until the full beneficial enjoyment vests; *Kay v. Scates*, 37 Pa. St. 31; *Harley v. Platts*, 6 Rich. 310; *Carradine v. Carradine*, 33 Miss. 698; the legal title does not vest in the *cestui que trust* until the termination of the trust; *Boyd v. England*, 56 Ga. 598.

the settlor, must have the same construction as in the case of a legal estate executed (*g*).

4. **Rule in *Shelley's case* applicable to trusts.**—As the *rule in Shelley's case* is not one of construction, that is, of intention, but of law, and was established to remedy certain mischiefs, which, if heirs were allowed to take as purchasers, * would be introduced into feudal tenures; [*110] it might be thought, that, as trusts are wholly independent of tenure, they ought not to be affected by the operation of the rule; and the cases of *Withers v. Allgood* (*a*), and *Bagshaw v. Spencer* (*b*), seem to lend some countenance to the doctrine. But not to mention that Lord Hardwicke himself appears in *Garth v. Baldwin* (*c*) to have doubted the position advanced by him in *Bagshaw v. Spencer*, other subsequent authorities have now established the principle, that although the rule may not be equally *applicable* to trusts, it shall be equally *applied* (*d*).

But in order to vest the fee in the ancestor under this rule, the word “heir” must be used, not in the sense *persona*

(*g*) *Wright v. Pearson*, 1 Eden, 126; *Austen v. Taylor*, ib. 367; and see *Brydges v. Brydges*, 3 Ves. jun. 126; *Jervoise v. Duke of Northumberland*, 1 J. & W. 571.

(*a*) Cited in *Bagshaw v. Spencer*, 1 Ves. sen. 160; 1 Coll. Jur. 403.

(*b*) 1 Ves. sen. 142; 1 Coll. Jur. 378.

(*c*) 2 Ves. 646.

(*d*) *Wright v. Pearson*, 1 Eden, 128; *Brydges v. Brydges*, 3 Ves. 120; *Jones v. Morgan*, 1 B. C. C. 206; *Webb v. Earl of Shaftesbury*, 3 M. & K. 599; *Roberts v. Dixwell*, 1 Atk. 610; *West*, 536; *Britton v. Twining*, 3 Mer. 176; *Spence v. Spence*, 12 C. B. N. S. 199; *Cooper v. Kynock*, 7 L. R. Ch. App. 398; *Collier v. Walters*, 17 L. R. Eq. 252; *Hervey v. Hervey*, W. N. 1874, p. 41; *Drew v. Maslen*, W. N. 1874, p. 65; *Batteste v. Maunsell*, 10 I. R. Eq. 97, on App. 314; [*Re White and Hindle's Contract*, 7 Ch. D. 201.] *Coape v. Arnold*, 2 Sm. & Gif. 311, may appear to militate against the general rule, but the true ground of

the decision was this: The codicil was made for a particular purpose, viz., for securing the jointure, and as it confirmed the will in all other respects, the testator's intention evidently was, that after securing the jointure, the trustees of the codicil should convey the estate to the uses declared by the will. It was, therefore, an executory trust, and the question was not whether in mere equitable estates a life interest resulting to the heir-at-law would unite with a limitation to the heirs of his body, but whether according to the true construction of the will the settlement was not meant to be executed in such a form as to make the heirs of his body purchasers. In this light the question was one of intention, and not of legal operation. The case was subsequently affirmed on appeal by Lord Cranworth, and it is conceived substantially, though not in terms, upon the ground above indicated as the true principle: see 4 De G. M. & G. 574.

designata, i. e. a particular individual, but as a term of succession, so as to transmit the estate to the heir for the time being forever. If, therefore, land be devised to a trustee in trust for A. for life, and after his decease in trust for the person who shall then be his heir or heiress and his or her heirs, in this case A. takes a life estate only, and the heir or heiress takes the fee simple by purchase (e); and of course the rule does not apply, if the legal estate be vested in trustees for the life of A. *in trust* for him, and the *legal remainder* after the death of A. be limited to the heirs of A.'s body, for here, as the life estate and the remainder are of different qualities (viz., one equitable and the other legal), they cannot unite (f)).

[*111] * 5. *Trusts executed and trusts executory distinguished.* — We have said, that if technical words be employed, they must be taken in their legal and technical sense; but as to this a distinction must be drawn between trusts *executed*, and trusts that are only *executory*; for to trusts executed the position is strictly applicable, but in the case of trusts that are executory it must be received with considerable allowance.

A trust *executed* is where the limitations of the equitable interest are complete and final; in the *executory* trust, the limitations of the equitable interest are intended to serve merely as minutes or instructions for perfecting the settlement at some future period (a).

The two confounded by Lord Hardwicke in *Bagshaw v. Spencer*. — The distinction we are considering was very early established, and was recognized successively by Lord Cowper (b), Lord King (c), Lord Talbot (d), and by no one more frequently than by Lord Hardwicke himself (e):

(e) *Greaves v. Simpson*, 10 Jur. N. S. 609.

(c) *Papillon v. Voice*, 2 P. W. 471.

(d) *Lord Glenorchy v. Bosville*.

(f) *Collier v. McBean*, 34 Beav. 426.

Cas. t. Talb. 3.

(a) See *Egerton v. Earl Brownlow*, 4 H. L. Cases, 210; *Tatham v. Vernon*, 29 Beav. 604.

(e) *Gower v. Grosvenor*, Barnard, 62; *Roberts v. Dixwell*, 1 Atk. 607; *Baskerville v. Baskerville*, 2 Atk. 279; *Marryat v. Townley*, 1 Ves. 102; *Read v. Snell*, 2 Atk. 648; *Woodhouse v. Hoskins*, 3 Atk. 24.

(b) *Bale v. Coleman*, 8 Vin. 267; *Earl of Stamford v. Sir John Hobart*, 3 B. P. C. 33.

yet in *Bagshaw v. Spencer* (*f*) Lord Hardwicke almost denied that any such distinction existed. But in a subsequent case (*g*) his Lordship felt himself called upon to offer some explanation. "He did not mean," he said, "in *Bagshaw v. Spencer*, that no weight was to be laid on the distinction, but that, if it had come recently before him, he should then have thought there was little weight in it, although he should have had that deference for his predecessors, as not to lay it out of the case, not intending to say that all which his predecessors did was wrong founded, which he desired might be remembered."

The distinction now established.— But whatever doubts may formerly have existed upon the subject, they have long since been dispelled by the authority of succeeding judges. "The words executory trust," said Lord Northington, "seem to me to have no fixed signification. Lord King describes an executory trust to be, where the party must come to this Court to have the benefit of the will. But that is the case of every trust. The true criterion is this. Wherever the assistance of this Court is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention that the Court should model the limitations; but where the trusts and limitations are *already ex- [*112] pressly declared, the Court has no authority to interfere, and make them different from what they would be at law" (*a*). And Lord Eldon observed, "Where there is an executory trust, that is, where the testator has directed something to be done, and has not himself completed the devise, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection with respect to the execution of that intention, the Court inquires what it is itself to do, and it will mould what remains to be done, so as to carry that intention into

(*f*) 1 Ves. 152; and see *Hopkins v. Hopkins*, 1 Atk. 594.

(*g*) *Exel v. Wallace*, 2 Ves. 323. And Lord Henley once said, he believed Lord Hardwicke had at last

renounced his opinion, *Barnard v. Proby*, 2 Cox, 8.

(*a*) *Austen v. Taylor*, 1 Eden, 366, 368; and see *Stanley v. Lennard*, ib. 95; *Wright v. Pearson*, ib. 125.

execution" (b). [And in a recent case the late M. R. observed "It is called an executory trust, where the testator instead of expressing exactly what he means, that is, filling up the terms of the trust, tells the trustees to do their best to carry out his intention. In that way it is executory, that if he has not put into words the precise nature of the limitations, he has said in effect, 'Now there are my intentions, do your best to carry them out' " (c).]

6. **Executory trusts, in marriage articles distinguished from the like trusts in wills.** — We proceed to the inquiry to what extent in executory trusts a latitude of construction is admissible; and to draw the line correctly, we must again distinguish between executory trusts in *marriage articles*, where the Court has a clue to the intention from the very nature of the contract, and executory trusts in *wills*, where the Court knows nothing of the object in view *à priori*, but in collecting the intention must be guided solely by the language of the instrument.

Occasionally confounded. — This distinction was at first but very imperfectly understood. Because executory trusts under wills admitted a degree of latitude, it was held by some, they were to be treated precisely on the same footing as executory trusts in marriage articles; while, because trusts under wills did not admit an equal latitude of construction, it was held by others that they were not to be distinguished from trusts executed (d). Even Lord Eldon once observed, "There is no difference in the execution of an executory trust created by will, and of a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity" (e). But Lord Manners said he could not assent to this doctrine (f); and Lord Eldon some time after took an opportunity of correcting himself (g).

(b) *Jervoise v. Duke of Northumberland*, 1 J. & W. 570; and see *Coape v. Arnold*, 4 De G. M. & G. 586.

[(c) *Miles v. Harford*, 12 Ch. D. 691, 699.]

(d) See *Bale v. Coleman*, 8 Vin. 267.

(e) *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 227, 230; and see *Turner v. Sargent*, 17 Beav. 519.

(f) *Stratford v. Powell*, 1 B. & B. 25; *Synge v. Hales*, 2 B. & B. 508.

(g) *Jervoise v. Duke of Northumberland*, 1 J. & W. 574.

***Distinction drawn by Sir W. Grant.** — The distinction we are considering has been put in a very clear light by Sir W. Grant. "I know of no difference," he said, "between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. Where the object is to make a provision by the settlement for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the *agreement* be to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention. But if a *will* directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement" (a).

7. "**Heirs of the body**" in articles construed first and other sons. — To apply the foregoing distinction to the cases that have occurred: if in *marriage articles* the real estate of the husband or wife be limited to the *heirs of the body*, or the *issue* (b) of the contracting parties, or either of them, or to the heirs of the body, or issue and their heirs (c), so that heirs of the body, or issue, if taken in their ordinary legal sense, would enable one or other of the parents to defeat the provision intended for the children, these words will then be construed in equity to mean first and other sons; and the settlement will be made upon them successively in tail, as purchasers (d).

Distinction where the settlement was after the marriage, and where before it. — If the settlement has been already made,

(a) *Blackburn v. Stables*, 2 V. & B. 369; and see *Maguire v. Scully*, 2 Hog. 113; *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 173; 2 Drur. & War. 18; 4 Ir. Eq. Rep. 375; *Sackville-West v. Viscount Holmesdale*, 4 L. R. H. L. 543; *Scarisbrick v. Lord Skelmersdale*, 4 Y. & C. 117.

(b) *Dod v. Cod*, Amb. 274; *Grier v. Grier*, 5 L. R. H. L. 688.

(c) *Phillips v. James*, 2 Drew. & Sm. 404.

(d) *Handick v. Wilkes*, 1 Eq. Ca. Ab. 393; *Trevor v. Trevor*, 1 P. W. 622; *Jones v. Langton*, 1 Eq. Ca. Ab. 392; *Cusack v. Cusack*, 5 B. P. C. 116; *Griffith v. Buckle*, 2 Vern. 13; *Stoner v. Curwen*, 5 Sim. 269, per Sir L. Shadwell; *Davies v. Davies*, 4 Beav. 64; *Rochford v. Fitzmaurice*, *ubi supra*.

then, provided the execution of it was after the marriage, it will be rectified by the articles (*e*); but if the execution of it was prior to the marriage, the Court will presume the parties to have entered into a different agreement (*f*), unless the agreement expressly state itself to be made in pursuance of the articles, when that presumption will [*114] be *rebutted, and the settlement will be rectified

(*a*), or unless it can be otherwise shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence that the discrepancy has arisen from mistake (*b*).

Limitation of the husband's property to the heirs of the body of the wife.— Under the law as it stood prior to the Fines and Recoveries Act (*c*), a strict settlement was not decreed, where the property of the *husband* was limited to the heirs of the body of the *wife*; for this created an entail which neither husband nor wife could bar without the concurrence of the other, and the intent might have been, that the husband and the wife *jointly* should have the power of destroying the entail (*d*); but it is conceived, that as to articles executed subsequently to the Act referred to, the case would be otherwise (*e*).

Where the settlement also contains a limitation to the parent for life, with remainder to first and other sons in tail.— Nor will the Court read heirs of the body as first and other sons, where such a construction is negatived by anything in the articles themselves: as if one part of an estate be limited to

(*e*) *Streatfield v. Streatfield*, Cas. t. Talb. 176; *Warrick v. Warrick*, 3 Atk. 293, *per* Lord Hardwicke; *Legg v. Goldwire*, Cas. t. Talb. 20, *per* Lord Talbot; *Burton v. Hastings*, Gilb. Eq. Rep. 113; S. C. 1 Eq. Ca. Ab. 393, overruled.

(*f*) *Legg v. Goldwire*, Cas. t. Talbot, 20; and see *Warrick v. Warrick*, 3 Atk. 291.

(*a*) *Honor v. Honor*, 1 P. W. 123; *Roberts v. Kingsley*, 1 Ves. 238; *West v. Errissey*, 2 P. W. 349; but not it seems against a purchaser, *Warrick v. Warrick*, 2 Atk. 291.

(*b*) *Bold v. Hutchinson*, 5 De G. M. & G. 565.

(*c*) See 3 & 4 W. 4. c. 74, ss. 16, 17.

(*d*) *Howel v. Howel*, 2 Ves. 358; *Whateley v. Kemp*, cited *ib.*; *Honor v. Honor*, 1 P. W. 123; *Green v. Ekina*, 2 Atk. 477, *per* Lord Hardwicke; *Highway v. Banner*, 1 B. C. C. 587, *per* Sir L. Kenyon; *Sackville-West v. Viscount Holmesdale*, 4 L. R. H. L. 555, *per* Lord Hatherley.

(*e*) *Rochfort v. Fitzmaurice*, 2 Drur. & War. 19.

the husband for life, remainder to the wife for life, remainder to the first and other sons in tail, and another part be given to the husband for life, remainder to the heirs male of his body; for, as it appears the parties knew how a strict settlement should be framed, the limitation of part of the estate in a different mode could only have proceeded from a different intention (*f*).

8. **Heirs female.**—It was formerly argued, that *daughters* in marriage articles were not entitled to the same consideration as sons, on the ground that they do not, like sons, continue the name of the family, and are generally provided for, not by the estate itself, but by portions out of the estate; but it is now clearly settled, that, as they are purchasers under the marriage, and are entitled to some provision, the Court will in their favour construe heirs female to mean daughters (*g*); and unless the articles themselves make an express provision for them by way of portion, &c. (*h*), will hold daughters, as well as sons, to be included under the general term of heirs of *the body (*a*), or [*115] issue (*b*). And the settlement will be executed on the daughters, in default of sons, as tenants in common in tail general, with cross remainders between them (*c*).

9. **Limitation of chattels to heirs of the body.**—If *chattels* be articulated to be settled on the parents for life, and then on the *heirs of the body* of either, or both, it seems the chattels will not vest absolutely in the parents, but in the eldest son as the heir, though taking by purchase, and if there be no son, in the daughters as co-heiresses (*d*); and for the son or daughters to take, it is not necessary that they should survive the parents and become the actual heir (*e*), unless there be

(*f*) *Howel v. Howel*, 2 Ves. 359; and see *Powell v. Price*, 2 P. W. 535; *Chambers v. Chambers*, Fitzgib. Rep. 127; S. C. 2 Eq. Ca. Ab. 35; *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 174.

(*g*) *West v. Errissey*, 2 P. W. 349.

(*h*) *Powell v. Price*, 2 P. W. 535; and see Mr. Fearne's observations, *Conting. Rem.* 108.

(*a*) *Burton v. Hastings*, Gilb. Eq. Rep. 118; S. C. 1 Eq. Ca. Ab. 393, per Lord Cowper.

(*b*) *Hart v. Middlehurst*, 3 Atk. 371; and see *Maguire v. Scully*, 2 Hog. 113; S. C. 1 Beat. 370.

(*c*) See *Marryat v. Townley*, 1 Ves. 106; *Phillips v. James*, 4 Drew. & Sm. 404.

(*d*) *Hodgeson v. Bussey*, 2 Atk. 89; S. C. Barm. 195. See *Bartlett v. Green*, 13 Sim. 218.

(*e*) *Theebridge v. Kilburne*, 2 Ves. 233.

words in the articles to give it to the heirs of the body living at the death of the surviving parent, as "if the parent die without *leaving* heirs of the body" (*f*).

10. **Articles to settle chattels on same trusts as real estate.** — Again, if in *marriage articles*, a party covenant to settle *personal estate* upon the trusts, and for the intents and purposes, upon and for which the freeholds are settled, the Court will not apply the limitations to the personal estate literally, the effect of which would be to vest the absolute interest in remainder in the first son on his birth, but will insert a proviso that will have the effect, at least to a certain extent, of making the personal estate follow the course of the real. .

Limitations over on dying under 21, or under 21 without issue. — Sir Joseph Jekyll said, the practice of conveyancers was to insert a limitation over on "dying under 21" (*g*): but Lord Hardwicke conceived the common limitation over to be on "dying under 21 without issue" (*h*). In *The Duke of Newcastle v. The Countess of Lincoln* (*i*), the chattels were articulated to be settled to the same uses as the realty, viz. to A. for life, remainder to A.'s first and other sons in tail male, remainder to B. for life, remainder to B.'s first and other sons in tail male, remainders over. A. died, having had a son who lived only nine months. Lord Loughborough held that the leaseholds had not vested absolutely in the deceased son of A., and ordered a proviso to be inserted in the settlement, that they should not vest absolutely in any son of B. who should not attain 21 or *die under that age leaving* [*116] *issue male*. From this decision an *appeal was

carried to the House of Lords (*a*); but, before the cause could be heard, a son of B. having attained 21, the decree was, that the son of B. had become absolutely entitled. Thus the House of Lords decided that the absolute interest had not vested in the first tenant in tail on his birth; but what proviso ought to have been inserted, whether a limitation over "on dying under 21," or "on dying under 21 without issue male," the House in the event was not called

(*f*) *Read v. Snell*, 2 Atk. 642.

(*i*) 3 Ves. 387, see the observations

(*g*) *Stanley v. Leigh*, 2 P. W. 690.

pp. 394, 397; and see *Scarsdale v.*

(*h*) *Gower v. Grosvenor*, Barn. 63;

Curzon, 1 J. & H. 51, 54.

S. C. 5 Mad. 348.

(*a*) 12 Ves. 218.

upon to determine. The order of the House of Lords in this case was made with the approbation of Lord Ellenborough and Lord Erskine (who took part in the debate), and also of Lord Thurlow (*b*). But Lord Eldon denied before the House that there was any distinction between articles and wills, and therefore relying upon *Foley v. Burnell* and *Vaughan v. Burslem*, two cases upon wills decided by Lord Thurlow, he said, had the cause come originally before him, he should have decreed the absolute interest to have vested in the eldest child upon birth; that assignments had been made of leasehold property under a notion that a son when born would take an absolute interest; and, were the House to sanction the decree of Lord Loughborough, it would shake a very large property (*c*). However, his Lordship conceived that Lord Hardwicke's doctrine was originally the best, and therefore, recollecting the opinion of that great Judge, the opinion of Sir Joseph Jekyll, and the decision of the Court below, and knowing the concurrent opinions of Lord Ellenborough and Lord Erskine, and also the opinion of Lord Thurlow (whose present sentiments, however, he could not reconcile with the cases of *Foley v. Burnell* and *Vaughan v. Burslem*, formerly decided by his Lordship) (*d*), he bowed to all these authorities; and, though he was in some degree dissatisfied with the determination, he nevertheless would not move an amendment (*e*).

Personalty cannot be knit to realty entirely.—It must be observed that a settlement of the personalty cannot be made exactly analogous to a settlement of the realty, whether the limitation adopted be “on dying under 21,” or “on dying under 21 without issue.” For if the former be supposed, then, the object of the articles being to knit the personal estate to the freehold, if the son die under age leaving issue who will succeed to the freehold, the two estates will go in different directions. But if the *limitation [*117]

(*b*) 12 Ves. 237.

(*c*) 12 Ves. 236, 237.

(*d*) Lord Eldon could not reconcile Lord Thurlow's opinion with these cases, because his Lordship refused

to admit the distinction between articles and wills.

(*e*) The Countess of Lincoln v. The Duke of Newcastle, 12 Ves. 237, and see *Sackville-West v. Viscount Holmesdale*, 4 L. E. H. L. 543.

over be "on dying under 21 without issue," then, if the son die leaving issue, the grandchild may die under age and unmarried, when the personalty will go to the son's personal representative, while the freeholds will devolve on the second son (a).

11. **Joint tenancy in articles construed tenancy in common.**

— Again, in *marriage articles*, as *joint tenancy* is an inconvenient mode of settlement on the children of the marriage (for, during their minorities no use can be made of their portions, as the joint tenancy cannot be severed) (b), the Court will rectify the articles by the presumed intent of the contract, and will permit words that would be construed a joint tenancy at law to create in equity a tenancy in common (c).

12. **Words supplied in articles.**—In other cases the Court has varied the literal construction by supplying words, as where the agreement was to lay out 200*l.* in the purchase of 30*l.* a year, to be settled on the husband and wife for their lives, remainder to the heirs of their bodies, remainder to the husband in fee, and, until the settlement should be made, the 200*l.* was to be applied to the separate use of the wife; and, if no settlement were executed during their joint lives, the 200*l.* was to go to the wife, if living, but, if she died before her husband, then to her brother and sister; and the wife died before her husband, but left issue; it was held the brother and sister had no claim to the fund, the words "if she died before her husband" intending plainly if she so died "without leaving issue" (d). [The Court has also in a modern settlement supplied a hotchpot clause (e).]

(a) Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 228, 229.

(b) Taggart *v.* Taggart, 1 Sch. & Lef. 88, *per* Lord Redesdale; and see Rigden *v.* Vallier, 3 Atk. 734, and Marryat *v.* Townley, 1 Ves. 103. But it would seem that an instrument executed by an infant, though voidable, severs the joint tenancy until it is avoided; but that if the infant when of age avoids the instrument the joint tenancy will arise again. Burnaby *v.* Equitable Reversionary Interest Society, 28 Ch. D.

416; Whittingham's case, 8 Rep. 42 b; Coke on Litt. 337 a, 337 b; but see May *v.* Hook, Coke on Litt. 246 a, note (1).

(c) Taggart *v.* Taggart, 1 Sch. & Lef. 84; Mayn *v.* Mayn, 5 L. R. Eq. 150.

(d) Kentish *v.* Newman, 1 P. W. 234; and see Targus *v.* Puget, 2 Ves. 194; Master *v.* De Croismar, 11 Beav. 184; Martin *v.* Martin, 2 R. & M. 507.

[(e) Miller *v.* Gulson, 13 L. R. Ir. 408.]

13. **Vague provision.** — It has been held in marriage articles that a trust to *provide suitably* for the settlor's younger children is not too vague to be executed, but the Court will direct an enquiry what the provision should be (f).

14. **How "heirs of the body" construed in executory trusts in wills.** — Next as to *wills*; and here, as no presumption arises *à priori*, that "*heirs of the body*" were intended as words of purchase, if the executory trust of real estate be to "A. and the heirs of his body" (g), or to "A. and the heirs of his body and their * heirs" (a), or to "A. for [*118] life, and after his decease to the heirs of his body" (b), the legal and ordinary construction will be adopted, and A. will be tenant in tail. So, where the estate was directed to be settled on the testator's "daughter and her children, and, if she died without issue," the remainder over, the Court said, that, by an immediate devise of the land in the words of the will, the daughter would have been tenant in tail, and in the case of a voluntary devise the Court must take it as they found it, though upon the like words in marriage articles it might have been otherwise (c).

"A. for life, and heirs male of his body, and their heirs male successively." — And where a testator directed lands to be settled on his "nephew for life, remainder to the heirs male of his body, and the heirs male of the body of every such heir male, severally and successively one after another as they should be in seniority of age and priority of birth, every elder and the heirs male of his body to be preferred before every younger," Lord Cowper said, the nephew took by a voluntary devise, and, although executory, it was to be taken in the very words of the will as a devise, and was not to be supported or carried further in a Court of Equity than the same words would operate at law in a voluntary convey-

(f) *Brenan v. Brennan*, 2 I. R. Eq. 266.

(g) *Harrison v. Naylor*, 2 Cox, 274; *Bagshaw v. Spencer*, 1 Ves. 151, *per* Lord Hardwicke; *Marshall v. Bousfield*, 2 Mad. 186.

(a) *Marryat v. Townley*, 1 Ves. 104, *per* Lord Hardwicke.

(b) *Blackburn v. Stables*, 2 V. & B. 370, *per* Sir W. Grant; *Seale v. Seale*, 1 P. W. 290; *Meure v. Meure*, 2 Atk. 266, *per* Sir J. Jekyll.

(c) *Sweetapple v. Bindon*, 2 Vern. 536.

ance (d). The decision that the nephew was tenant in tail went apparently upon the ground that the words "and the heirs male of the body of every such heir male, severally and successively, &c." were all included in the notion of an entail, and *expressio eorum, quæ tacite insunt, nihil operatur*.

"Proper entail on the heir male." — And in a more recent case, where the executory trust was for A. generally, with a direction that the trustees should not give up their trust till "a proper entail was made to the heir male by him," it was determined that A. took an estate tail (e). However, in another case, where the devise was extremely similar, viz., to A. with a direction that the estate should be entailed on his heir male, Lord Eldon, on the assumption that it was an executory trust, and not a legal devise, considered the entail so doubtful that he would not compel a purchaser to accept a title under it (f).

[*119] * **Heirs of the body construed to mean sons, even in wills, where any expression of intention to that effect.** — But "heirs of the body" will in the case of executory trusts in wills as well as in articles be read first and other sons, provided the testator expressly manifest such an intention, as if he direct a settlement on A. for life "without impeachment of waste" (a), or with a limitation to preserve contingent remainders (b), or if he desire that "care be taken in the settlement that the tenant for life shall not bar the entail" (c), or otherwise show that the direction to settle on A. and the heirs of his body, was not meant to give him a power of disposition over the estate (d);

(d) *Legatt v. Sewell*, 2 Vern. 551.

(e) *Blackburn v. Stables*, 2 V. & B. 367; recognized in *Marshall v. Bousfield*, 2 Mad. 166; and see *Dodson v. Hay*, 3 B. C. C. 405.

(f) *Jervoise v. Duke of Northumberland*, 1 J. & W. 559; and see *Woolmore v. Burrows*, 1 Sim. 512; *Sealey v. Stawell*, 9 I. R. Eq. 499.

(a) *Lord Glenorchy v. Bosville*, Cas. t. Talbot, 3.

(b) *Papillon v. Voice*, 2 P. W. 471; and see *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 158.

(c) *Leonard v. Lord Sussex*, 2 Vern. 526.

(d) *Thompson v. Fisher*, 10 L. R. Eq. 207. It is presumed that the Court attributed an intention to this effect, for if the Court directed a strict settlement, merely on the ground that the trust was executory, it would conflict with the authorities, and with the canon laid down in the House of Lords, that in the case of a will or a deed of gift the intention that the very words mentioned in the instrument as proper for the more complete convey-

and in one case "heirs of the body" was so construed, where a testator had devised to the separate use of a *feme covert* for life, so as she alone should receive the rent, and the husband should not intermeddle therewith, and *after her decease* in trust for the heirs of her body; for, from the limitation to the heirs immediately after the wife's decease, coupled with the direction that the husband should not intermeddle with the estate, the Court collected the intention of excluding the husband's curtesy, an object which could only be accomplished by giving to "heirs of the body" the construction of words of purchase (e).

"A. and the heirs of his body, as counsel shall advise," &c. — And a direction to settle on A. and the heirs of his body "as counsel shall advise" (f), or "as the executors shall think fit" (g), is strong collateral evidence, that something more was intended than a simple estate tail.

Rule in Shelley's case not applicable where the life estate is to the separate use. — Sir L. Shadwell thought that if a testator directed an estate to be settled on a *feme covert* for life, for her *separate use*, and at her death on her *issue*, the feme would not be tenant in tail, for the separate use requiring the life estate to be vested in trustees (h), the equitable estate in the feme could not unite with the legal estate in the issue, and therefore the rule in Shelley's case would not apply (i).

* Trevor v. Trevor. — Where the trust was to settle [*120] on A. for life, *without impeachment of waste*, with remainder to his issue in tail male in *strict settlement*, the Court directed the estates to be settled on A. for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to the daughters, as tenants in common in tail male, with cross remainders in tail male, and

ance are not to be used, must be plainly manifested by the *first instrument*, and will not be assumed *merely because the trust is executory*. Sackville-West v. Viscount Holmesdale, 4 L. R. H. L. 555, *per* L. C.; and see Duncan v. Bluet, 4 I. R. Eq. 469.

S. C. West's Rep. t. Lord Hardwicke, 536.

(f) White v. Carter, 2 Eden, 366; reheard, Amb. 670.

(g) Read v. Snell, 2 Atk. 642.

[(h) See now 45 & 46 Vict. c. 75, s. 1.]

(i) See Stonor v. Curwen, 5 Sim.

(e) Roberts v. Dixwell, 1 Atk. 607; 268; Earl of Verulam v. Bathurst, 13

proper limitations to trustees were inserted to preserve contingent remainders (a). But where a testator devised an estate to C. for life, and on her death to be "strictly entailed on her eldest son J." the Court directed a settlement on C. for life, with remainder to J. for life, with remainder to his first and other sons successively in tail general, with remainder to his daughters as tenants in common in tail general, &c. (b).

16. "**Heirs of the body**" and "**issue**" not of the same import. — We may here remark that "*heirs of the body*" and "*issue*" are far from being synonymous expressions. The former are properly words of limitation, whereas the latter term is in its primary sense a word of purchase. In several cases the Court appears to have ordered a strict settlement from the use of the term "*issue*," where, had the expression been "*heirs of the body*," the estate would probably have been construed an estate tail (c).

17. **Daughters included in "heirs of the body" and "issue."** — Of course, *daughters* as well as sons will be included under "*heirs of the body*" (d), or "*issue*" (e); for they equally answer the description, and are equally objects of bounty; and where these words are construed as words of purchase the settlement will be made upon the daughters in default of sons, as tenants in common in tail, with cross remainders between or amongst them (f).

18. **Waste.** — In executing a strict settlement the Court, unless there be some special words which point to the contrary, will not make the tenant for life dispunishable for

Sim. 386; Coape v. Arnold, 2 Sm. & Gif. 311; 4 De G. M. & G. 574.

(a) Trevor v. Trevor, 13 Sim. 108; affirmed on this point, 1 H. of L. Ca. 239; and see Coape v. Arnold, 2 Sm. & Gif. 311; 4 De G. M. & G. 574.

(b) Sealey v. Stawell, 9 I. R. Eq. 499.

(c) Ashton v. Ashton, cited in Bagshaw v. Spencer, 1 Coll. Jur. 402; Meure v. Meure, 2 Atk. 265; and see Horne v. Barton, G. Coop. 257; Dodson v. Hay, 3 B. C. C. 405; Stonor v. Curwen, 5 Sim. 264; Crozier v. Cro-

zier, 2 Conn. & Laws. 311; Rochford v. Fitzmaurice, 1 Conn. & Laws. 158; Bastard v. Proby, 2 Cox, 6; Haddelsey v. Adams, 22 Beav. 276.

(d) Bastard v. Proby, 2 Cox, 6.

(e) Meure v. Meure, 2 Atk. 265; Ashton v. Ashton, cited in Bagshaw v. Spencer, 1 Coll. Jur. 402; Trevor v. Trevor, 13 Sim. 108.

(f) Meure v. Meure, Ashton v. Ashton, Bastard v. Proby, and Trevor v. Trevor, *ubi supra*; Marryat v. Townley, 1 Ves. sen. 105.

waste (g), and a direction to settle to the separate use without power of anticipation is inconsistent with a life estate without impeachment of waste (*h*).

* **Limitation to preserve contingent remainders.**—Be- [*121]
fore 8 & 9 Vict. c. 106, the Court took care that proper limitations to *trustees* should be inserted after the life estates for the preservation of contingent remainders (*a*); and although, by the effect of the Act referred to, contingent remainders are no longer destructible by the *forfeiture, merger, or surrender of the previous life estate*, the limitations to trustees to preserve may still, it is conceived, be properly interposed, with the view of affording a convenient means of protecting the interests of contingent remaindermen in the event of wilful waste or destruction being committed by the tenant for life before any remainderman comes *in esse* (*b*).

19. **First freehold in trustees.**—In a case occurring before the Fines and Recoveries Act, (3 & 4 W. 4. c. 74), where the testator had shown an anxious wish that the power of defeating the entail should be as much restricted as possible, the Court, instead of giving the first freehold to the tenant for life, which would have enabled him to make a tenant to the præcipe, ordered the freehold during his life to be vested in *trustees* in trust for him (*c*).

Protector.—However, in a case occurring after the Fines and Recoveries Act, where an estate was vested in a trustee upon trust to execute a strict settlement on Lady Le Despencer and her family, and the Master, to whom a reference was directed, approved of a settlement on Lady Le Despencer for life, &c., but refused to appoint a *protector* under the 32nd section of the Act, the Court held that, though in certain cases it might be advisable to appoint a protector, there should be special circumstances to warrant it; that

(g) *Stanley v. Coulthurst*, 10 L. R. Eq. 259; *Davenport v. Davenport*, 1 H. & M. 779.

(h) *Clive v. Clive*, 7 L. R. Ch. App. 433.

(a) *Harrison v. Naylor*, 2 Cox, 247; S. C. 3 B. C. C. 108; *Woolmore v. Burrows*, 1 Sim. 512; *Baskerville*

v. Baskerville, 2 Atk. 279; *Trevor v. Trevor*, 13 Sim. 108; *Stamford v. Hobart*, 3 B. P. C. 31; and see *Hopkins v. Hopkins*, 1 Atk. 593.

(b) *Garth v. Cotton*, 1 Ves. 554.

(c) *Woolmore v. Burrows*, 1 Sim. 512, see 527.

the trustee was the "settlor" within the meaning of the 32nd section, and had the power to appoint a protector; and as he did not desire it, the Court, unless there were good reasons to the contrary, would not control his discretion; that a protector under the Act was an irresponsible person, and was at liberty to act from caprice, ill-will, or any bad motive, and might even take a bribe for consenting to bar the entail, without being amenable to the Court, and therefore, on the whole, it was better not to clog the settlement with a protector (*d*).

20. **Gravelkind lands.** — Where *gravelkind* lands are the subject of the executory trust, the circumstance of the custom will not prevent the settlement being made upon [*122] the first and other sons successively, for * the heirs take not by custom, but under the construction of a Court of Equity, which must be guided by the rules of the Common Law (*a*).

21. **Where the testator directs a settlement, but formally declares the limitations.** — Where the Court enlarges and rectifies the will it does so on the ground of the limitations having been imperfectly declared; but if a testator direct a settlement, and be *his own conveyancer*, that is, declare the limitations himself, intending them to be *final*, the hands of the Court are bound, and the words must be taken in their natural sense (*b*). Thus where a testator devised to A. for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A., remainders over, and then directed the residue of his personal estate to be laid out in the purchase of lands, and declared that the lands when purchased "should remain and continue to, for, and upon such and the like estate or estates, uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as were by him before limited, and declared of and concerning his lands and premises thereinbefore devised, or

(*d*) *Banks v. Le Despencer*, 11 Sim. 508. and see *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 173; 2 Drur. & War.

(*a*) *Roberts v. Dixwell*, 1 Atk. 607. 21; *Doncaster v. Doncaster*, 3 Kay

(*b*) *Franks v. Price*, 3 Beav. 182; & J. 26.

as near thereto as might be, and the deaths of parties would admit," Lord Northington said that the testator had referred no settlement to his trustees to complete, but had declared his own uses and trusts, which being declared, there was no instance where the Court had proceeded so far as to alter or change them (*c*). However, the decision to which his Lordship came seems not to have met with the entire approbation of Lord Eldon (*d*).

22. Executory trusts of chattels in wills.— In the cases relating to executory trusts of *chattels* in wills, the bequest, instead of being direct, has generally been by way of reference to a previous strict settlement of realty.

The law upon this subject was for a long time in a very unsatisfactory state, but the result of the cases (*e*) at the present day appears to be that where a testator devises lands in strict settlement, and then bequeaths heir-looms to be held by or in trust for the parties entitled under the limitations of the real estate, or without making any bequest, directs or expresses a desire that the *heir-looms shall be [*123] held upon the like trusts, even though the testator should add the words "as far as the rules of law and equity will permit," the use of the heir-looms will belong to the tenant for life of the real estate for his life, and the property of the heir-looms will vest absolutely in the first tenant in tail immediately on his birth, though he afterwards die an infant. The Court, in these cases, either regards the trust as executed, and not of a directory character, or if the trusts be executory, the Court considers it has no authority in making a settlement to insert a limitation over on the tenant in tail dying under 21. However, there is no unlawfulness in such a limitation, so that if a bequest of heir-looms in a will be clearly executory, and the testator manifests a distinct intention that a settlement shall be made of the heir-looms, and that such clauses shall be inserted as will render them

(*c*) *Austen v. Taylor*, 1 Eden. 368.

(*d*) See *Green v. Stevens*, 17 Ves. 76; *Jervoise v. Duke of Northumberland*, 1 J. & W. 572.

(*e*) *Scarsdale v. Curzon*, 1 Johns. & Hem. 40, and the cases there cited

and commented upon; and see *Stratford v. Powell*, 1 B. & B. 1; *Doncaster v. Doncaster*, 3 K. & J. 26; *Christie v. Gosling*, 1 L. R. H. L. 279; *Harrington v. Harrington*, 3 L. R. Ch. App. 564; 5 L. R. H. L. 87.

inalienable for as long a period as the law will permit, the Court would no doubt execute the intention by settling the heir-looms, and inserting a limitation, by which the absolute interest in the first tenant in tail should by his death under 21, or by his death under 21 without issue, be carried over to the person next entitled in remainder (a). But if heir-looms be assigned or bequeathed to trustees, not upon trust simply for the persons entitled under the limitations of the real estates, which, notwithstanding the words "so far as the rules of law and equity will permit," would vest them absolutely in the first tenant in tail who came into being, but upon trust, "as far as the rules of law and equity will permit," for the persons successively entitled to the *actual freehold* (in the sense of the *freehold in possession*), with a proviso that no *child* of a person made tenant for life shall take absolutely unless he attained 21, here, though the trust be executed, and not executory, the absolute vesting is coupled with the *possession*, and is therefore suspended until the death of the tenant for life, and will then vest in the child who, after his death, shall first fulfil the requisite of being tenant in tail in possession and attaining the age of 21 years (b).

In one case a testator gave certain jewels to his nephew John, "to be held as heir-looms by him, and by his eldest son on his decease, and to descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law and equity will permit." John [*124] died in 1866, leaving *an eldest son, the plaintiff (born in testator's lifetime), and the Court declared that the jewels were in trust for John for life, and on his death for plaintiff for his life, and on his death for his eldest son, to be vested at 21, and if he died in the lifetime of plaintiff, or after his death but under 21, leaving an eldest son born before the death of plaintiff, then in trust for such

(a) See the observations of Lord Loughborough in *Foley v. Burnell*, 1 B. C. C. 284, and of Lord Thurlow in *Vaughan v. Burslem*, 3 B. C. C. p. 106; and of V. C. Wood in *Scarsdale v. Curzon*, 1 J. & H. 40; *Sackville-*

West v. Viscount Holmesdale, 4 L. R. H. L. 543.

(b) *Scarsdale v. Curzon*, 1 J. & H. 40; *Christie v. Gosling*, 1 L. R. H. L. 279; *Harrington v. Harrington*, 3 L. R. Ch. App. 564; 5 L. R. H. L. 87.

eldest son, to be vested at 21 (a), with an ultimate trust in favour of John (b).

In another case (c) a testatrix devised real and personal estate to trustees in trust for A. for life, with remainders over in tail. A peerage was afterwards granted to A. for life with remainder to B., her second son, in tail male; and then the testatrix, by a codicil directed the trustees to settle the real and personal estate "in a course of entail to correspond as nearly as might be with the limitations of the barony, in such manner and form and with such powers as the trustees should consider proper or their counsel should advise," and it was held that the object of making provision for the holders of a peerage, and the object of making provision for the children of a marriage, appeared so analogous, that it was the duty of the Court, in the former as well as the latter case, to prevent, as far as possible, the defeat of the object; and accordingly the real estate was directed to be settled on A.'s second son for life, without impeachment of waste, with remainders to his first and other sons in tail male, &c., with power to the tenant for life of jointuring and charging portions; and the personal estate was directed to be settled so as to go along with the real estate in the nature of heir-looms, so far as the rules of law and equity would allow, but so as not to vest in any tenant in tail by purchase who died under 21 without leaving issue inheritable under the entail.

[A bequest of chattels to a peer and his successors, or to a peer and his successors to be enjoyed with and to go with the title, is not sufficient to create an executory trust or any binding obligation affecting the legatee (d). So under a bequest of chattels to trustees "upon trust to permit and suffer the property to go, and be held and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity will admit, by the person for the time being actually possessed of the title in the nature of heir-looms," the first person who succeeds to the honours takes the chattels

(a) *Shelly v. Shelly*, 6 L. R. Eq. 540. *Holmesdale*, 4 L. R. H. L. 543; reversing *West v. Viscount Holmesdale*,

(b) *S. C.* 6 L. R. Eq. 550. 3 L. R. Eq. 474.

(c) *Sackville-West v. Viscount* [(d) *Re Johnston*, 26 Ch. D. 538.]

[*125] absolutely (e). * But in *Montagu v. Lord Inchiquin* (a), where there was a gift of family diamonds to Lucius Baron Inchiquin, and the testatrix added "and I direct the said diamonds to be delivered to Lord Inchiquin free of duty and I make the above request to Lord Inchiquin as head of the existing family, and so far as I lawfully can, I direct that the said diamonds shall be deemed heir-looms in the family of Inchiquin, and shall be held and enjoyed by the person for the time being bearing the title of Baron Inchiquin," V. C. Hall held that the gift did not lapse by the death of Lucius Baron Inchiquin in the lifetime of the testatrix, that the clause was not executory, but that the direction created an obligation or trust which would have been binding on Lucius Baron Inchiquin had he survived, and he also held that the disposition of chattels to follow a dignity is good where there is no rule against perpetuities transgressed. But a gift to trustees of the contents of a house "upon trust to select and set aside a collection of the best paintings, &c., for the Earl of E. and his successors to be held and settled as heir-looms and to go with the title," is clearly executory and gives only life interests to persons *in esse* at the death of the testator (b).]

Where freeholds and chattels real were devised to trustees in trust for the testator's son for life, with a direction that, if he married, the trustees should settle and secure the premises as a *jointure to the wife* for her life, and to the *issue* share and share alike; and the son died, having *married twice*, but having had issue by the first wife only, viz.: three daughters, the Court directed a settlement of the whole on the second wife for life by way of jointure, with remainder to the three daughters as to the freeholds as tenants in common in tail, with cross remainders between them, and as to the chattels real, as tenants in common absolutely (c).

[Where freeholds were settled by will in strict settlement

[(e) *Re Viscount Exmouth*, 23 Ch. D. 158; *Tollemache v. Earl of Coventry*, 2 Cl. & Fin. 611.]

[(b) *Re Johnston*, 26 Ch. D. 538.]

(c) *Mason v. Mason*, 5 I. R. Eq. 288.

[(a) *Montagu v. Lord Inchiquin*, 23 W. R. 592.]

with a shifting clause in certain events, and the testator gave leaseholds to trustees "upon and for such trusts, intents, and purposes, and with, under and subject to such powers, provisos and directions as, regard being had to the difference in the tenure of the premises respectively, would best and most nearly correspond with the uses, trusts, powers, provisos, and directions in the will declared and contained concerning the freeholds," it was held that the trust as to the leaseholds was executory, and that assuming the shifting clause, if applied verbatim to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection (*d*).]

* 23. **Whether joint tenancy in executory trusts in** [*126] **wills to be construed as tenancy in common.** — Again in *wills*, if the words taken in their usual sense would create a *joint tenancy*, the Court has no authority, as it has in articles, to execute the trust by giving a tenancy in common; but, where the testator has shown a desire of providing for his children (*a*), or putting himself *in loco parentis* for his grandchildren (*b*), the Court has adopted the same construction, as in articles: however, in the cases which have occurred, there has always been some accompanying circumstance to denote a tenancy in common, as the estate really intended.

24. **Settlement on a feme "strictly."** — If personalty be directed by a will to be settled on a female "*strictly*," it will be settled upon her (if married) for her sole and separate use without power of anticipation, with a limitation to her absolutely, if she survive her husband, and should she predecease him, then for such intents and purposes as she may by will appoint, and in default of appointment, for her next of kin (*c*).

If a testator bequeath a fund in trust for a *feme*, and direct that, in case of her marriage, it shall be so settled that

[(*d*) *Miles v. Harford*, 12 Ch. D. 691. The shifting clause was, in this case, held to be divisible, and in the events which had happened, not void.]

(*a*) *Marryat v. Townley*, 1 Ves. 102.

(*b*) *Synge v. Hales*, 2 B. & B. 499.

(*c*) *Loch v. Bagley*, 4 L. R. Eq. 122.

she may enjoy the same for her life, the Court will settle it with a *clause against anticipation* (d).

[If personal estate be bequeathed for the benefit of a *feme sole* "to be paid upon her marriage and to be settled upon her by her settlement," the Court will upon her marriage settle it on the usual trusts for her and *her children* (e).]

25. *Post-nuptial settlements*.—Executory trusts in *post-nuptial* settlements, whether voluntary or founded on a valuable consideration, will be construed in the same manner as executory trusts in wills (f).

26. *Of powers in executory trusts*.—We shall conclude this branch of our subject with a few observations upon the powers to be introduced in the execution of settlements, where the trust is executory.

Powers not inserted without a direction.—If the testator or contracting parties give no directions as to the insertion of powers, the Court cannot, upon the ground of implied intention, order a power to be introduced (g), except [*127] *possibly a power of *leasing*, which differs from all other powers in being an almost necessary adjunct for the preservation of the estate itself (a).

"Usual powers."—If the authority be expressed in general terms, as "to insert all *usual* powers," the trustees

(d) *In re Dunnill's Trust*, 6 I. R. Eq. 322; and see *Turner v. Sargent*, 17 Beav. 515; *Stanley v. Jackman*, 28 Beav. 450.

(e) *Duckett v. Thompson*, 11 L. R. Ir. 424.]

(f) *Rochfort v. Fitzmaurice*, 1 Conn. & Laws, 158.

(g) *Wheate v. Hall*, 17 Ves. 80, see 85; and see *Brewster v. Angell*, 1 J. & W. 628. In a recent case, however, where a will had simply directed a settlement without authorizing any powers expressly, the M. R. held a tacit intention to be implied that powers of leasing, sale and exchange, and appointment of new trustees, and of signing receipts, with provisions for maintenance, education, and ad-

vancement, should be inserted, *Turner v. Sargent*, 17 Beav. 515. [And in a subsequent case, *Fry, J.*, approved of and followed the decision in *Turner v. Sargent*, and said that the case of *Wheate v. Hall* did not appear to him to conflict with that view, that there the direction was that the trustees should secure the property in a particular manner, which was so fully detailed in the will that the Court thought it could not, although the trusts were in terms executory, insert a power of sale. *Wise v. Piper*, 13 Ch. D. 848, 853.] And see *Scott v. Steward*, 27 Beav. 367; *Charlton v. Rendall*, 11 Hare, 296.

(a) See *Fearne's P. W.* 810; *Woolmore v. Burrows*, 1 Sim. 518.

may then introduce powers of leasing for 21 years (*b*), of sale and exchange (*c*), of maintenance and advancement (*d*), of varying securities (*e*), and of appointment of new trustees (*f*); and, it seems, where the property is joint, or contains mines, or is fit for building, they may also insert powers of partition, of leasing mines, and of granting building leases (*g*). "But there is a palpable distinction," said Sir Launcelot Shadwell, "between powers for the *management* and better enjoyment of the settled estate, as powers of leasing, of sale and exchange, &c. which are beneficial to all parties, and powers which confer *personal privileges* on particular parties, such as powers to jointure, to charge portions, to raise money for any particular purpose, &c." (*h*). The latter, therefore, may not be introduced under a direction to insert *usual* powers, for they have the effect of diminishing the *corpus* of the settled estate, and the Court has no rule by which to determine the *quantum* of the charge (*i*). But where an estate was directed to be settled so as to go along with a Peerage, and the trustees were to insert all such powers as they should "consider proper or their counsel should advise," it was ruled that powers of jointuring and charging portions were for the honour of the whole settlement, and not a favour to the first tenant for life only, in contradistinction to his successors, and therefore ought to be inserted (*j*). If the will or articles direct the insertion of some particular powers by name, then, as *expressio unius exclusio alterius*, the meaning of the words "usual powers" will be *materially qualified. Thus, where it [*128] was stipulated that the settlement should contain a power of leasing for 21 years in possession, a power of sale

(*b*) See *Hill v. Hill*, 6 Sim. 144; *The Duke of Bedford v. The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(*c*) *Hill v. Hill*, 6 Sim. 136; *Peake v. Penlington*, 2 V. & B. 311; and see *Williams v. Carter*, Append. to Sugd. Treat. on Powers, p. 945, 8th Ed.

(*d*) *Mayn v. Mayn*, 5 L. R. Eq. 150.

(*e*) *Sampayo v. Gould*, 12 Sim. 426.

(*f*) *Lindow v. Fleetwood*, 6 Sim. 152; *Brewster v. Angell*, 1 J. & W.

628, per Lord Eldon; *Sampayo v. Gould*, 12 Sim. 426.

(*g*) See *Hill v. Hill*, 6 Sim. 145; *The Duke of Bedford v. The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(*h*) *Hill v. Hill*, 6 Sim. 144.

(*i*) *Higginson v. Barneby*, 2 S. & S. 516, see 518; *In re Grier's Estate*, 6 I. R. Eq. 1.

(*j*) *Sackville-West v. Viscount Holmesdale*, 4 L. R. H. L. 543.

and exchange, of appointment of new trustees, and *other usual powers*, it was held that a power of granting building leases could not be inserted (a). So, if the trustees be authorized to insert a power of sale and exchange of estates in the county of Hereford, and *all other usual powers*, they would not be justified in extending the power of sale and exchange to estates lying in a different county (b). And where a testator directed that the settlement should contain all proper powers for making leases, and *otherwise according to circumstances*, and that provision should also be made for the appointment of new trustees, and the Court was asked to insert a power of sale and exchange, Lord Eldon said, "It was held by Sir W. Grant, that unless the insertion of a power were authorized by the direction to make a settlement, it could not be introduced; and if, where nothing is expressed, nothing can be implied, it is impossible, where something is expressed, I can imply more than is expressed; and particularly where the will notices what powers are to be given" (c). But, where a testator directed the insertion of powers of leasing, and sale or exchange or partition, and then added, "And my will is, that in such intended settlement shall be inserted all such other proper and reasonable powers as are *usually* inserted in settlements of the like nature," and the question was raised, whether, under these words, a power of appointment of new trustees might be introduced, Lord Cottenham, then M. R., said, "he had referred to the will, and as he found that those general words were in a separate and distinct sentence, he was of opinion that they would authorize the insertion of the power" (d).

"**Proper powers.**" — A testator had directed the insertion of *proper powers* for making leases or otherwise to be reserved to the *tenants for life*, while qualified to exercise them, and, whenever disqualified, to the *trustees*. In the execution of the settlement, a power of sale and exchange was introduced, and was *limited to the trustees with the consent of the tenant*

(a) *Pearse v. Baron*, Jac. 158. 625; and see *Horne v. Barton*, Jac.

(b) *Hill v. Hill*, 6 Sim. 141, *per* 439.

Sir L. Shadwell.

(d) *Lindow v. Fleetwood*, 6 Sim.

(c) *Brewster v. Angell*, 1 J. & W. 152.

for life; but it was held by Lord Eldon, that the insertion of the power in that mode was not in conformity with the instructions (e). It was afterwards debated, before Sir T. Plumer, whether a power of sale and exchange could, in any form, be admitted, when his Honour said, that "The first point to be *considered was, in whom the pow- [*129] ers were to be vested; and it was clear that they were to be given to the tenants for life, if qualified, but if they should not be able to act, to the trustees. — Now, if the power of sale and exchange was to be given to the tenant for life without check or control, he could not say that it was a proper power; on the contrary, it might be very dangerous, as the tenant for life might for many reasons be induced to sell, when it might not be for the benefit of the remaindermen; nor was it usual to give him this power without the check of requiring the assent of the trustees. Take it the other way: if the tenant for life was disqualified, as by infancy, could the Court say it was a proper power to be given exclusively to the trustees?" And therefore his Honour thought the power of sale and exchange could not be introduced (a).

[27. *Settled Land Act*. — Now by the *Settled Land Act*, 1882 (b), the tenant for life (c), under the settlement is empowered to sell, exchange, enfranchise and concur in partitioning the settled land, and to grant building, mining and other leases; and by the *Conveyancing and Law of Property Act*, 1881 (d), the trustees of settlements made after the 31st Dec. 1881, are empowered (subject to any contrary intention expressed in the settlement), during the minority of any person beneficially entitled to the possession of the settled land, to manage the property and apply any income for the maintenance, education or benefit of the infant; and consequently powers for these purposes are not now usually inserted in settlements, and it is conceived that the Court

(e) *Brewster v. Angell*, 1 J. & W. 625.

(a) *Horne v. Barton*, Jac. 437.

[(b) 45 & 46 Vict. c. 38, ss. 3, 4, 6, *et seq.*]

[(c) The tenant for life under the Act is the person *beneficially* entitled

to possession, which includes receipt of the rents and profits; and by s. 58 the powers of a tenant for life are exercisable by various other limited owners therein enumerated.]

[(d) 44 & 45 Vict. c. 41, s. 42.]

would not insert any of them in a settlement under a direction to insert "usual" or "proper" powers; but would in the absence of special directions allow the statutory powers to take effect without variation.

28. **Conveyancing Act.** — It may further be observed that by the Conveyancing and Law of Property Act, 1881 (e), "it is declared that the powers given by the Act to any person and the covenants, provisions, stipulations and words which under the Act are to be deemed included or implied in any instrument, shall be deemed *proper* powers, covenants, provisions, stipulations and words to be given by or to be contained in any such instrument," and all persons in a fiduciary position and their solicitor are exempted from any [*130] * obligation to exclude the operation of the Act where such exclusion is possible.]

29. **Powers of sale.** — If a settlement of stock with a power of varying securities contain a covenant to settle real estate upon the like trusts, and with the like powers, a power of sale and exchange is implied, as corresponding to the power of *varying securities* (a).

30. **Multiplication of charges.** — Trusts are often created by words of reference to other trusts, and where this is the case, there should be a proviso, where such is the intention, that charges on the estate shall not be increased or multiplied. Should the clause, however, be omitted, the Court will exercise its judgment on the question whether the duplication of charges was or not intended by the parties; and as a general rule a referential trust ought not to be so read as to create a duplication (b).

SECTION II.

OF IMPLIED TRUSTS.

1. **General rule.** — Wherever a person, having a power of disposition over property, manifests any intention with

[(e) 44 & 45 Vict. c. 41, s. 66.]

greaves' Contract, 25 Ch. D. 595;]

(a) Williams v. Carter, Append.

and see Horne v. Barton, Jac. 440.

to Sug. Treat. on Powers, p. 945, 8th ed.; Elton v. Elton (No. 2), 27 Beav. 684; [Re Garnett Orme and Har-

(b) Hindle v. Taylor, 5 De G. M. & G. 577; Boyd v. Boyd, 9 L. T. N. S. 106.

respect to it in favour of another, the Court, *where there is sufficient consideration, or in a will where consideration is implied*, will execute that intention, through the medium of a trust, however informal the language in which it happens to be expressed.¹

¹ IMPLIED TRUSTS. — *Precatory Words*. — If the object and the subject-matter are sufficiently certain, a trust will arise from precatory words; *Hardley v. Wrightson*, 60 Md. 198; from such words as "desire"; *Coburn v. Anderson*, 131 Mass. 613; "request," *Eddy v. Hartshorne*, 34 N. J. Eq. 419; "wish and desire," *Cockrill v. Armstrong*, 31 Ark. 580; "wish and request," *Cook v. Ellington*, 6 Jones Eq. 371; "it is my wish"; *Brunson v. Hunter*, 2 Hill's Ch. 490; *McRae v. Means*, 34 Ala. 349; "having confidence"; *Dresser v. Dresser*, 46 Me. 48; *Reid v. Blackstone*, 14 Gratt. 363; "with full confidence that they will"; *Bull v. Bull*, 8 Conn. 47; "have the fullest confidence"; *Warner v. Bates*, 98 Mass. 274; *Knox v. Knox*, 69 Wis. 172; 48 Am. Rep. 487; "to dispose of and divide among my children"; *Collins v. Carlisle*, 7 B. Mon. 14; "I allow my son to support her"; *Hunter v. Stenbridge*, 12 Ga. 243; "I desire that he should appropriate not exceeding \$50 per year"; *Erickson v. Willard*, 1 N. H. 217. Such words insufficient; "a wish and desire" that wife will leave "any part remaining" in certain way; *Church v. Disbrow*, 52 Pa. St. 219; if there is an absolute gift, precatory words will not annex a trust to it; *Barrett v. Marsh*, 126 Mass. 213; recommending a person to one's care and requesting such provision as his judgment may dictate; *Colton v. Colton*, 21 Fed. Rep. 594; *Kirkland v. Narramore*, 105 Mass. 31; 7 Am. Rep. 497; to widow "during her lifetime for the support of herself and my children"; *Billar v. Loundes*, 2 Dema. (N. Y.) 590; to wife "recommending her to make some small allowance"; *Ellis v. Ellis*, 15 Ala. 296; 50 Am. Dec. 132; "and it is my request and desire that my wife E. should," &c.; *Williams v. Worthington*, 49 Md. 572; 33 Am. Rep. 286; words indicating merely a wish and appealing to one's discretion; *Wilde v. Smith*, 2 Dema. (N. Y.) 93; executor to "control and direct" son; *Paper Mill Co. v. Fisk*, 47 Mich. 212; for "E. or M. or the survivor of them"; *Idé v. Pierce*, 134 Mass. 260; if full discretion is given in will, precatory words will not create; *Corby v. Corby*, 85 Mo. 371; "assumed" would do right thing, no trust; *Rose v. Porter*, 141 Mass. 309; to give to children as she should think best; *Gilbert v. Chapin*, 19 Conn. 351; to such other persons as she might wish and request to be members of her family; *Harper v. Phelps*, 21 Conn. 257; *Loring v. Loring*, 100 Mass. 340; "family," as to after born children; *Weems v. Harrold*, 75 Ga. 886; to dispose of as she may think proper; *Thompson v. McKisick*, 3 Humph. 631; "having full confidence"; *Pennock's Est.* 20 Pa. St. 268; see also *Spooner v. Lovejoy*, 108 Mass. 534; *Hess v. Singler*, 114 Mass. 59; *Whiting v. Whiting*, 4 Gray, 240; *Andrews v. Bank*, 3 Allen, 313; *Smith v. Wildman*, 37 Conn. 387; *Cole v. Littlefield*, 35 Me. 439; *Wright v. Miller*, 8 N. Y. 9. It is not easy to lay down any arbitrary rule, as the words, circumstances, and evident intention of the parties must control; 1. *Jar. Wills*, 385 and note; 3 *Redf. Wills*, 416; *Hill on Trustees*, 73; *Negroes v. Plummer*, 17 Md. 165; *Warner v. Bates*, 98 Mass. 276. No trust will arise where the words simply state the motive leading to a gift, as "to enable him to maintain children," *Bryan v. Howland*, 98 Ill. 625; no matter how strong the language, a trust will not be implied, if the testator declare he does not intend one; *Whipple v. Adams*, 1 Met. 444; *Barrett v.*

2. **Words precatory.**—A frequent case of implied trust arises where a testator employs words *precatory*, or *rec-*

Marsh, 126 Mass. 213; nor will a trust be implied if it would be repugnant to other parts of the instrument; *Brunson v. Hunter*, 2 Hill. Ch. 490; precatory words must give way to positive provisions; *Church v. Disbrow*, 52 Pa. St. 219; if power is given to be exercised or not at discretion, no trust results; *Lines v. Darden*, 5 Fla. 51; only such words as may be treated as imperative will raise a trust; *Harrison v. Harrison*, 2 Gratt. 1; 44 Am. Dec. 365; 2 Redf. Wills, 411; *Gilbert v. Chapin*, 19 Conn. 342; *Lucas v. Lockhart*, 10 Swedes & M. 466; 48 Am. Dec. 766; the earlier American cases favored making the words imply a trust, in order to carry out the intention of the party; *Ward v. Peloubet*, 2 Stockt. Ch. 305; *Little v. Bennett*, 5 Jones Eq. 156; *Harrison v. Harrison*, 2 Gratt. 1; but the later American cases, like the English, give only the natural meaning to the words, and the tendency is against converting a legatee into a trustee; *Van Ameer v. Jackson*, 35 Vt. 173; *Rhett v. Mason*, 18 Gratt. 541; *Negroes v. Plummer*, 17 Md. 165; *Whipple v. Adams*, 1 Met. 445; *Van Dyne v. Van Dyne*, 1 McCart. 397; *Ellis v. Ellis*, 15 Ala. 296; *Davis v. Mailey*, 134 Mass. 588; *Howard v. Carusi*, 109 U. S. 733.

Maintenance.—There arises a similar question where the parent, or one standing in *loco parentis*, receives property with certain directions or suggestions regarding the maintenance of his family or dependents, viz.;—was it the intention to create a trust or merely to mention the motive of the gift? *Paisley's App.* 70 Pa. St. 158; the one holding for maintenance of children is entitled to any surplus, and not obliged to account for the application of the fund; *Smith v. Smith*, 11 Allen, 423; if such a one is unfit to handle the funds, the court can distribute it; *Chase v. Chase*, 2 Allen, 101; for case of his death, see *Bowditch v. Andrew*, 8 Allen, 339; *Andrews v. Bank*, 3 Allen, 313; the habits and ability of the *cestui que* trust are to be considered in determining the amount necessary for him; *Kilroy v. Wood*, 42 Hun, 636; sometimes alimony paid a wife may be deducted; *Ireland v. Ireland*, 84 N. Y. 321, reversing 18 Hun, 362. See also *Curtis v. Smith*, 6 Blatchf. 537; *Erisman v. Poor*, 47 Pa. St. 509; *Lucas v. Lucas*, 7 Rich. Eq. 180. Whether child's right to maintenance ceases when he becomes of age, see *Baker v. Red*, 4 Dana, 158; it depends largely upon the words as showing the testator's intention; *Sargent v. Bourne*, 6 Met. 32; if given for particular purpose, the fund cannot be reached by creditors through any process open to them; *Clute v. Bool*, 8 Paige, 83; *Bramhall v. Ferris*, 14 N. Y. 44; *Wells v. McCall*, 64 Pa. St. 207.

There is no implied trust where merely the motive for the gift is stated, as "to enable him to maintain the children"; *Bryan v. Howland*, 98 Ill. 625; *Burke v. Valentine*, 52 Barb. 412; *Burt v. Herron*, 66 Pa. St. 400; "having full confidence in sufficient and judicious provision"; *Sears v. Cunningham*, 122 Mass. 538; *Barrett v. Marsh*, 126 Mass. 213; or that she will divide the surplus justly; *Paisley's App.* 70 Pa. St. 158; *Willard's App.* 15 P. F. Smith, 265; "home and residence" does not include maintenance; *Kennedy's App.* 81 Pa. St. 163. Sometimes the conditions of a will necessarily raise such a trust to carry out intentions of the testator; *Fay v. Taft*, 12 Cush. 448; *Walker v. Whiting*, 23 Pick. 313; *Watson v. Mayrant*, 1 Rich. Ch. 449; *Sohier v. Trinity Church*, 109 Mass. 1.

Trusts are sometimes implied from the agreements of parties; *Pownal v. Taylor*, 10 Leigh, 183; *Currie v. White*, 45 N. Y. 822; *Pingree v. Coffin*, 12 Gray, 288; *Conway v. Kinsworthy*, 21 Ark. 9.

commendatory, or expressing a belief (c). Thus if he "desire" (d), "will" (e), "request" (f), "will and *desire" (a), "will and declare" (b), "wish and [*131] request" (c), "wish and desire" (d), "entreat" (e), "most heartily beseech" (f), "order and direct" (g), "authorize and empower" (h), "recommend" (i), "beg" (j),

(c) *Cary v. Cary*, 2 Sch. & Lef. 189, *per* Lord Redesdale; *Paul v. Compton*, 8 Ves. 380, *per* Lord Eldon.

(d) *Harding v. Glyn*, 1 Atk. 469; *Mason v. Limbury*, cited *Vernon v. Vernon*, Amb. 4; *Trot v. Vernon*, 8 Vin. 72; *Pushman v. Filliter*, 3 Ves. 7; *Brest v. Offey*, 1 Ch. Rep. 246; *Bonser v. Kinnear*, 2 Giff. 195; *Cary v. Cary*, 2 Sch. & Lef. 189; *Cruwys v. Colman*, 9 Ves. 319; and see *Shaw v. Lawless*, Ll. & G. temp. Sugden, 154; C. S. 5 Cl. & Fin. 129; S. C. Ll. & G. temp. Plunket, 559.

(e) *Eales v. England*, Pr. Ch. 200; *Clowdsley v. Pelham*, 1 Vern. 411.

(f) *Pierson v. Garnet*, 2 B. C. C. 38; S. C. affirmed, id. 226; *Eade v. Eade*, 5 Mad. 118; *Moriarty v. Martin*, 3 Ir. Ch. Rep. 26; *Bernard v. Minshull*, Johns. 276; and see *House v. House*, 31 L. T. N. S. 427; 23 W. R. 22.

(a) *Birch v. Wade*, 3 V. & B. 198; *Forbes v. Ball*, 3 Mer. 437.

(b) *Gray v. Gray*, 11 Ir. Ch. Rep. 218. The devise was "to A. and B. in the most absolute manner, and willing and declaring an intention." But the decision turned also on other grounds.

(c) *Foley v. Parry*, 5 Sim. 138; affirmed 2 M. & K. 138.

(d) *Liddard v. Liddard*, 28 Beav. 266.

(e) *Prevost v. Clarke*, 2 Mad. 458; *Meredith v. Heneage*, 1 Sim. 553, 555, *per* Chief Baron Wood; and see *Taylor v. George*, 2 V. & B. 378.

(f) *Meredith v. Heneage*, 1 Sim. 553, *per* Chief Baron Wood.

(g) *Cary v. Cary*, 2 Sch. & Lef. 189; *White v. Briggs*, 2 Phill. 583.

(h) *Brown v. Higgs*, 4 Ves. 708; 5 id. 495; affirmed 8 Ves. 561; and in D. P. 18 Ves. 192.

(i) *Tibbits v. Tibbits*, Jac. 317; S. C. affirmed 19 Ves. 666; *Horwood v. West*, 1 S. & S. 387; *Paul v. Compton*, 8 Ves. 380, *per* Lord Eldon; *Malim v. Keighley*, 2 Ves. jun. 333; S. C. ib. 529; *Malim v. Barker*, 3 Ves. 150; *Meredith v. Heneage*, 1 Sim. 553, *per* Chief Baron Wood; *Kingston v. Lorton*, 2 Hog. 168; *Cholmondeley v. Cholmondeley*, 14 Sim. 590; *Hart v. Tribe*, 18 Beav. 215; and see *Meggison v. Moore*, 2 Ves. jun. 630; *Sale v. Moore*, 1 Sim. 534; *Ex parte Payne*, 2 Y. & C. 636; *Randal v. Hearle*, 1 Anat. 124; *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1. As to *Cunliff v. Cunliff*, Amb. 686, see *Pierson v. Garnet*, 2 B. C. C. 46; *Malim v. Keighley*, 2 Ves. jun. 532; *Pushman v. Filliter*, 3 Ves. 9.

(j) *Corbet v. Corbet*, 7 I. R. Eq. 456.

Implied trusts are not within statute of uses; *Strimpfler v. Roberts*, 18 Pa. St. 283; 57 Am. Dec. 606; nor statute of limitations; *Ins. Co. v. Page*, 17 B. Mon. 412; 66 Am. Dec. 165; governed by same general rules as other trusts; *Kelley v. Jenness*, 50 Me. 455; 79 Am. Dec. 623; an implied trust is ended when the trustee manifests his intention to hold the trust property as his own; *De Cordova v. Smith*, 9 Tex. 129; 58 Am. Dec. 136. In the province of Ontario, "I wish and desire" were not precatory merely, but directory; *Baby v. Miller*, 1 E. & A. 218; likewise "requesting her to will the same to our children, as

"hope" (*k*), "do not doubt" (*l*), "be well assured" (*m*), "confide" (*n*), "have the fullest confidence" (*o*), "trust" (*p*), "trust and confide" (*q*), "have full assurance and confident hope" (*r*), be "under the firm conviction" (*s*), "in the full belief" (*t*), "well know" (*u*), or use such expressions as "of course the legatee will give" (*v*), "in consideration the legatee has promised to give" (*w*), ["to be applied as I have requested him to do" (*x*),] &c.; in these and similar cases, the intention of the testator is considered [*132] *imperative, and the devisee or legatee is bound, and may be compelled to give effect to the injunction (*a*). And though instances of this kind generally occur upon the construction of wills, the doctrine does not apply to wills exclusively, but has been extended also to settlements *inter vivos* (*b*).

(*k*) *Harland v. Trigg*, 1 B. C. C. 142; and see *Paul v. Compton*, 8 Ves. 380.

(*l*) *Parsons v. Baker*, 18 Ves. 476; *Taylor v. George*, 2 V. & B. 378; *Malone v. O'Connor*, Ll. & G. *temp.* Plunket, 465; and see *Sale v. Moore*, 1 Sim. 534.

(*m*) *Macey v. Shumer*, 1 Atk. 389; S. C. Amb. 520. See *Ray v. Adams*, 3 M. & K. 237.

(*n*) *Griffiths v. Adams*, 5 Beav. 241; and see *Shepherd v. Nottidge*, 2 J. & H. 766.

(*o*) See *Shovelton v. Shovelton*, 32 Beav. 143; *Wright v. Atkyns*, 17 Ves. 255, 19 Ves. 299, G. Coop. 111 T. & R. 143; *Webb v. Wools*, 2 Sim. N. S. 267; *Palmer v. Simmonds*, 2 Drew. 225; *Curnick v. Tucker*, 17 L. R. Eq. 320; *Le Marchant v. Le Marchant*, 18 L. R. Eq. 414.

(*p*) *Irvine v. Sullivan*, 8 L. R. Eq. 673.

(*q*) *Wood v. Cox*, 1 Keen, 317; S. C. 2 M. & C. 684; *Pilkingon v. Boughey*, 12 Sim. 114.

(*r*) *Macnab v. Whitbread*, 17 Beav. 299.

(*s*) *Barnes v. Grant*, 2 Jur. N. S. 1127.

(*t*) *Fordham v. Speight*, 23 W. R. 782.

(*u*) *Bardswell v. Bardswell*, 9 Sim. 323; *Nowlan v. Nelligan*, 1 B. C. C. 489; *Briggs v. Penny*, 3 Mac. & Gord. 546, 3 De G. & Sm. 525; [but see the observations on *Briggs v. Penny* in *Stead v. Mellor*, 5 Ch. D. 225.]

(*v*) *Robinson v. Smith*, 6 Mad. 194; but see *Lechmere v. Lavie*, 2 M. & K. 198.

(*w*) *Clifton v. Lombe*, Amb. 519. [(*x*) *Re Fleetwood*, 15 Ch. D. 594.]

[(*a*) A precatory trust in favour of children may be executed by limiting the interests of females to their separate use, for such a limitation effectually carries out the intention; *Willis v. Kymer*, 7 Ch. D. 181.]

(*b*) *Liddard v. Liddard*, 28 Beav. 266.

she shall think best"; *Finlay v. Fellowes*, 14 Chy. 66; trusting that she will make such disposition thereof as shall be just and proper among my children, no trust created; *Nelles v. Elliot*, 25 Chy. 329.

3. **No trust raised where there is uncertainty.**—But precatory words will be held to express a wish only, and not a command, if it be impracticable for the Court to deal with it as a trust; as if a testator devise a house to his wife and express a wish that his sister should live with her, for here no interest in the house is given to the sister, and how can the Court compel the widow and sister to live together (c)? and the like construction will prevail where either the objects intended to be benefited are imperfectly described (d), or the amount of the property to which the trust should attach is not sufficiently defined (e); for the difficulty that would attend the execution of such imperfect trusts is converted by the Court into an argument that no trust was really intended (f). The rule as laid down by Lord Alvanley, and since recognized as the correct principle, is, that a trust is created in those cases only “where a testator points out *the objects, the property, and the way in which it shall go*” (g).

4. **Secus.** Where the uncertainty arises from want of evidence.—But although uncertainty in the object will unquestionably furnish a reason for holding no trust to have been intended by precatory words, it will be otherwise where the

(c) *Graves v. Graves*, 13 Ir. Ch. Rep. 182; and see *Hood v. Oglander*, 34 Beav. 513.

(d) *Harland v. Trigg*, 1 B. C. C. 142; *Tibbits v. Tibbits*, 19 Ves. 664, per Lord Eldon; *Richardson v. Chapman*, 1 Burn's Eccles. Law, 245; *Pierston v. Garnet*, 2 B. C. C. 45, per Lord Kenyon; S. C. id. 230, per Lord Thurlow; *Knight v. Knight*, 3 Beav. 173, per Lord Langdale; *Sale v. Moore*, 1 Sim. 534; *Cary v. Cary*, 2 Sch. & Lef. 189, per Lord Redesdale; *Meredith v. Heneage*, 1 Sim. 542, see 558, 559, 556; *Ex parte Payne*, 2 Y. & C. 636; *Reid v. Atkinson*, 5 I. R. Eq. 162, 373.

(e) *Lechmere v. Lavie*, 2 M. & K. 197; *Knight v. Knight*, 3 Beav. 148; *Meredith v. Heneage*, 1 Sim. 556; *Buggins v. Yates*, 9 Mod. 122; *Sale v. Moore*, 1 Sim. 534; *Anon. Case*, 8

Vin. 72; *Tibbits v. Tibbits*, 19 Ves. 664, per Lord Eldon; *Wynne v. Hawkins*, 1 B. C. C. 179; *Pierston v. Garnet*, 2 B. C. C. 45, per Lord Kenyon; S. C. ib. 230, per Lord Thurlow; *Bland v. Bland*, 2 Cox, 349; *Le Maitre v. Bannister*, cited in note to *Eales v. England*, Pr. Ch. 200; *Sprange v. Barnard*, 2 B. C. C. 585; *Pushman v. Filliter*, 3 Ves. 7; *Attorney-General v. Hall*, Fitzg. 314; *Wilson v. Major*, 11 Ves. 205; *Eade v. Eade*, 5 Mad. 118; *Curtis v. Rippon*, 5 Mad. 434; *Russell v. Jackson*, 10 Hare, 213.

(f) *Morice v. Bishop of Durham*, 10 Ves. 536, per Lord Eldon.

(g) *Malim v. Keighley*, 2 Ves. jun. 335. See *Knight v. Boughton*, 11 Cl. & Fin. 548, 551; *Briggs v. Penny*, 3 Mac. & G. 546; *Greene v. Greene*, 3 I. R. Eq. 631; [*Stead v. Mellor*, 5 Ch. D. 225.]

uncertainty arises from the circumstance that the [*133] Court has not before it for its *guidance the *whole intention* of the testator in reference to the object: and in such a case the Court will make a declaration that the devisee or legatee is a trustee for objects unascertainable, and (unless the trust was by way of charge upon the estate of the devisee or legatee) will decree a resulting trust for the benefit of the heir-at-law or next of kin, according to the nature of the property (a).

5. *Uncertainty of the objects.*—“*Family.*”—The *objects* have been held to be uncertain where *personal estate* was given to A., with a hope “that he would continue it in the *family*” (b); but, as regards personal estate, the word family has been sometimes construed as equivalent to relations, that is next of kin (c); and where *freeholds* were so devised, it was held that by “family” was to be understood the worthiest member of it, viz., the heir-at-law (d). But the designation was held to be too uncertain as to freeholds, where the request was to distribute “amongst such members of the person’s family” as he should think most deserving (e).

“*Heirs.*”—In another case *both real and personal estate* were blended together, and given to A., in full confidence that she would devise the whole of the estate to “such of the heirs of the testator’s father as she might think best deserved

(a) *Corporation of Gloucester v. Wood*, 3 Hare, 131; *Briggs v. Penny*, 3 Mac. & G. 546; *Bernard v. Minshull*, Johns. 276; see and consider the observations of V. C. Wood, ib. 286.

(b) *Harland v. Trigg*, 1 B. C. C. 142. See *Wright v. Atkyns*, G. Coop. 121; *Woods v. Woods*, 1 M. & C. 401; *Re Parkinson’s Trust*, 1 Sim. N. S. 242; *Williams v. Williams*, 1 Sim. N. S. 358; *Lambe v. Eames*, 10 L. R. Eq. 267; 6 L. R. Ch. App. 597; but see *White v. Briggs*, 2 Phil. 583; and *Liley v. Hey*, 1 Hare, 580.

(c) *Cruwys v. Colman*, 9 Ves. 319; *Grant v. Lynam*, 4 Russ. 292. [But the primary meaning of the word “family” in a will is “children,” and

any other meaning must be supplied by the context, *Pigg v. Clarke*, 3 Ch. D. 672; and under a testamentary gift by a married man to his family, his widow takes no interest; see *Re Hutchinson and Tenant*, 8 Ch. D. 540. As to the meaning of the word “family,” when occurring in a power of selection, see *Sinnott v. Walsh*, 3 L. R. Ir. 12; 5 L. R. Ir. 27.]

(d) *Atkyns v. Wright*, 17 Ves. 255; S. C. 19 Ves. 299; S. C. G. Coop. 111; and see S. C. T. & R. 143; *Malone v. O’Connor*, Ll. & G. temp. Plunket, 465; *Griffiths v. Evans*, 5 Beav. 241; *White v. Briggs*, 2 Phil. 583; *Green v. Marsden*, 1 Drew. 646.

(e) *Green v. Marsden*, 1 Drew. 646.

a preference," and the Court could not determine whether heirs were intended, or next of kin, or both (*f*).

"*Relations*."—Again, a residuary estate was bequeathed to A., with a recommendation that she would "consider the testator's *relations*." Sir A. Hart asked, Who were the objects of the trust? Did the testator mean relations at his own death, or at A.'s death? Did he mean that she should have the liberty of executing the trust the *day after his death? And his Honour was of [*134] opinion that no trust could attach (*a*). But there can be no uncertainty of the objects where such a trust is to be executed by *will*, for then those who answer the description at the death of the donee of the power must be the parties contemplated (*b*).

6. *Uncertainty of the subject matter*.—The Court has refused to establish the trust from the uncertainty of the *subject* (that is, of the property claimed to be bound by the trust), where the recommendation was to "consider certain persons" (*c*), "to be kind to them" (*d*), "to remember them" (*e*), "to do justice to them" (*f*), "to make ample provision for them" (*g*), "to use the property for herself and her children, and to remember the church of God and the poor" (*h*), "to give what should remain at his death, or what he should die seised or possessed of" (*i*), "to finally

(*f*) *Meredith v. Heneage*, 1 Sim. 542, see 558, 559, 565; but see *Wright v. Atkyns*, G. Coop. 119.

(*a*) *Sale v. Moore*, 1 Sim. 534, see 540; and see *Macnab v. Whitbread*, 17 Beav. 299; but see *Wright v. Atkyns*, G. Coop. 119–128.

(*b*) *Pierson v. Garnet*, 2 B. C. C. 38; S. C. id. 226; *Atkyns v. Wright*, 17 Ves. 255; S. C. 19 Ves. 299; S. C. G. Coop. 111; and see S. C. T. & R. 162; *Knight v. Knight*, 3 Beav. 173; *Meredith v. Heneage*, 1 Sim. 558.

(*c*) *Sale v. Moore*, 1 Sim. 534; and see *Hoy v. Master*, 6 Sim. 568.

(*d*) *Buggins v. Yates*, 9 Mod. 122.

(*e*) *Bardswell v. Bardswell*, 9 Sim. 319.

(*f*) *Le Maitre v. Bannister*, Pr.

Ch. 200, note (1); *Pope v. Pope*, 10 Sim. 1; *Ellis v. Ellis*, 44 L. J. N. S. Ch. 225; [*Cole v. Hawes*, 4 Ch. D. 238.]

(*g*) *Winch v. Brutton*, 14 Sim. 379; *Fox v. Fox*, 27 Beav. 301.

(*h*) *Curtis v. Rippon*, 5 Mad. 434.

(*i*) *Sprange v. Barnard*, 2 B. C. C. 585; *Green v. Marsden*, 1 Drew. 646; *Pushman v. Filliter*, 3 Ves. 7; *Wilson v. Major*, 11 Ves. 205; *Eade v. Eade*, 5 Mad. 118; *Wynne v. Hawkins*, 1 B. C. C. 179; *Lechmere v. Lavie*, 2 M. & K. 197; *Bland v. Bland*, 2 Cox, 349; *Attorney-General v. Hall*, Fitzg. 314; and see *Meredith v. Heneage*, 1 Sim. 556; *Tibbits v. Tibbits*, 19 Ves. 664; *Pope v. Pope*, 10 Sim. 1.

appropriate as he pleased," with a recommendation to divide amongst certain persons (*j*), to divide and dispose of the savings (*k*), or the bulk of the property (*l*), or where the donee of the property had power to dispose of any part he pleased, whether expressly given him, or arising from implication, or from the nature of the subject (*m*). [So, where the testator gave all his property to his wife and expressed his "wish that whatever property his wife might possess at her death should be equally divided between his children," the wife was held to be absolutely entitled (*n*).] But where the recommendation was that the legatee, in case she married again, should settle what she possessed under the testator's will to her separate use, and should bequeath what she should die possessed of under the will in favour of [*135] certain * persons, it was held that the *whole* personal estate was overreached by the trust (*a*).

7. **Whether trust or power, is a question of intention, not of grammatical import.** — Where both objects and property are certain, yet no trust will arise, if the testator expressly declare that the language is not to be deemed imperative, or the construing it a trust would be a contradiction to the terms in which the preceding bequest is given (*b*); or if, all circumstances considered, it is more probable that the testator meant to communicate a mere discretion (*c*); or if a testator give an estate to a feme covert to be her sole and separate property, "with *power* to appoint to her husband or children" (*d*); or the testator at the same time declare that the

(*j*) *White v. Briggs*, 15 Sim. 33.

(*k*) *Cowman v. Harrison*, 10 Hare, 234.

(*l*) *Palmer v. Simmonds*, 2 Drew. 221.

(*m*) *Malim v. Keighley*, 2 Ves. jun. 531, *per* Lord Loughborough; and see *Knight v. Knight*, 3 Beav. 174; 11 Cl. & Fin. 513; *Huskinson v. Bridge*, 4 De G. & Sm. 245.

[(*n*) *Parnell v. Parnell*, 9 Ch. D. 96.]

(*a*) *Horwood v. West*, 1 S. & S. 387.

(*b*) *Webb v. Woods*, 2 Sim. N. S.

267; *Huskinson v. Bridge*, 4 De G. & Sm. 245.

(*c*) *Bull v. Vardy*, 1 Ves. jun. 270; *Knott v. Cottee*, 2 Phill. 192; *Knight v. Knight*, 3 Beav. 148; *Meggison v. Moore*, 2 Ves. jun. 630; *Hill v. Bishop of London*, 1 Atk. 618; *House v. House*, W. N. 1874, p. 189; and see *Paul v. Compton*, 8 Ves. 380; *Knight v. Knight*, 3 Beav. 174; 11 Cl. & Fin. 513; *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1; *Shepherd v. Nottidge*, 2 J. & H. 766; *Eaton v. Watts*, 2 W. R. 108.

(*d*) *Brook v. Brook*, 3 Sm. & Gif.

estate shall be "unfettered and unlimited" (e); or, "in the legatee's entire power" (f); or be "left to his entire judgment" (g); or if he "recommend but do not absolutely enjoin" (h); or if a testator give the property to his wife, "well knowing her *sense of justice and love to her family*, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of her children" (i); [or "to be used by her in such ways and means as she may *consider best* for her own benefit and that of my three children" (j); or "feeling confident that she will act justly to our children in dividing the same when no longer required by her" (k); or "in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her decease" (l);] or "to be at her disposal in any way she may think best for the benefit of herself and family" (m); [or "to his wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of his family, having *full confidence that [*136] she will do so" (a); or if he give the residue of his property to legatees, "his desire being that they shall distribute such residue as they *think* will be most agreeable to his wishes" (b).]

The construction of the words we are considering never turns on their grammatical import: they may be imperative, but are not necessarily so (c). In *Shaw v. Lawless* (d), the trustees were recommended to employ a receiver, and Lord

280; and see *Paul v. Compton*, 8 Ves. 880; *Howorth v. Dewell*, 29 Beav. 18; [*Ahearne v. Ahearne*, 9 L. R. Ir. 144.]

(e) *Meredith v. Heneage*, 1 Sim. 542; S. C. 10 Price, 230; *Hoy v. Master*, 6 Sim. 568.

(f) *Eaton v. Watts*, 4 L. R. Eq. 151.

(g) *McCormick v. Grogan*, 1 I. R. Eq. 313.

(h) *Young v. Martin*, 2 Y. & C. Ch. Ca. 582.

(i) *Greene v. Greene*, 3 I. R. Eq. 90, 629.

[(j) *M'Alinden v. M'Alinden*, 11 I. R. Eq. 219.]

[(k) *Mussoorie Bank v. Raynor*, 7 App. Cas. 321; 9 L. R. Ind. App. 70.]

[(l) *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. D. 394.]

(m) *Lambe v. Eames*, 10 L. R. Eq. 267; 6 L. R. Ch. App. 597.

[(a) *Re Hutchinson and Tenant*, 8 Ch. D. 540.]

[(b) *Stead v. Mellor*, 5 Ch. D. 225.]

(c) *Meggison v. Moore*, 2 Ves. jun. 632, *per* Lord Loughborough; and see *Johnston v. Rowlands*, 2 De G. & Sm. 385.

(d) *Ll. & G. t. Sugden*, 154; 5 Cl. & Fin. 129; *Ll. & G. t. Plunket*, 559.

Cottenham, alluding to that case, observed, "It was there laid down as a rule which I have since acted upon, that though 'recommendation' may in some cases amount to a direction and create a trust, yet, that being a *flexible* term, if such a construction of it be inconsistent with any *positive* provision in the will, it is to be considered as a recommendation and nothing more. In that case the interest supposed to be given to the party recommended was inconsistent with the other powers which the trustees were to exercise, and those powers being given in unambiguous terms, it was held that as the two provisions could not stand together, the flexible term was to give way to the inflexible term" (e).

8. **Trustees of this kind not always so strictly bound as in a common trust.** — If a trust be created, it does not follow that it shall be equally restrictive, as in the case of a clear ordinary trust. Thus, an estate was devised to A. and her heirs, "in the fullest confidence" that after her decease she would devise the property to the family of the testator; and Lord Eldon asked, if there were any case in which the doctrine had been carried so far, that the tenant in fee was not at liberty, with respect to *timber and mines*, to treat the estate in the same husbandlike manner as another tenant in fee? and his Lordship said he should hesitate a long time before he held that the person bound by the trust was not entitled to cut timber in the ordinary management of the property (f). And so it was afterwards decided by the House of Lords on appeal (g).

9. **Case of trustee taking no beneficial interest.** — On the other hand, the settlement may be so specially worded that the person bound by the trust takes for life only, with remainder to the children (h), or is not even tenant [*137] for life and takes no *beneficial interest at all. Thus, where a testator devised to his wife in fee, "under the firm conviction that she would dispose of and manage the same for the benefit of her children," the widow claimed

(e) Knott v. Cottee, 2 Phill. 192.

(f) Wright v. Atkyns, T. & R. 157, 163.

(g) See Lawless v. Shaw, Ll. & G. t. Sugden, 164.

(h) Wace v. Mallard, 21 L. J. N. S. Ch. 355.

to be tenant for life, but the Court held that she was merely a trustee (a).

10. **Where the words raise a partial trust, the surplus does not result.** — Where the words are construed in equity to raise a partial trust, the devisee or legatee is treated as beneficial owner, subject to the charge, and the *surplus* will not result to the heir or next of kin, but will belong to the devisee or legatee (b).

11. **Implied trusts now rather discouraged.** — The current of decisions has of late years set against the doctrine of converting the devisee or legatee into a trustee; [and the Court now refuses to extend the doctrine, and will not imply a trust, unless it appears from the will that such was the intention of the testator (c).]

12. **Directions as to maintenance.** — Under the head of trusts which we are now considering, may be classed the cases where property is given to a parent or other person standing or regarded *loco parentis*, with a direction touching the *maintenance* of the children. The first question is, Did the settlor intend to impose a trust, or do the words express only the motive of the gift? Instances where *no trust* is created are, where the bequest is to a person "to enable him to maintain the children" (d), or an absolute bequest is made, and afterwards the motive is assigned, as "that he may support himself and his children" (e), or "*for the maintenance of himself and his family*" (f), [or "towards the support and maintenance of her two children until they shall

(a) *Barnes v. Grant*, 26 L. J. N. S. Ch. 92; S. C. 2 Jur. N. S. 1127; and see *Greene v. Greene*, 3 I. R. Eq. 98, 629; *Corbet v. Corbet*, 7 I. R. Eq. 456.

(b) *Wood v. Cox*, 1 Keen, 317; 2 M. & C. 684; *Irvine v. Sullivan*, 8 L. R. Eq. 673.

(c) *Sale v. Moore*, 1 Sim. 540; and see *Meredith v. Heneage*, id. 566; *Lawless v. Shaw*, Ll. & G. t. Sugden, 164; *Knight v. Knight*, 3 Beav. 148; *Williams v. Williams*, 1 Sim. N. S. 358; *Lefroy v. Flood*, 4 Ir. Chanc. Rep. 9; *Lambe v. Eames*, 10 L. R. Eq.

267; 6 L. R. Ch. App. 597; [*Stead v. Mellor*, 5 Ch. D. 225; *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. D. 394; *Mussoorie Bank v. Raynor*, 7 App. Cas. 321, 330.]

(d) *Benson v. Whittam*, 5 Sim. 22; but see *Leach v. Leach*, 13 Sim. 304; and see *Ryan v. Keogh*, 4 I. R. Eq. 357.

(e) *Thorp v. Owen*, 2 Hare, 607; see 611.

(f) *Re Robertson's Trust*, 6 W. R. 405; *Bond v. Dickinson*, 33 L. T. N. S. 221.

attain the age of twenty-one years" (g);] or "to A. for her own use and benefit absolutely, having full confidence in her sufficient and judicious provision for her children (h), or, "being well assured that she will husband the means left to her for the sake of herself and her children" (i), [*138] or "to be applied by *her in the bringing up and maintenance of her children" (a). Instances of the creation of a *trust* are where property is given, "that he may dispose thereof for the benefit of himself *and* his children" (b), or "at her sole and entire disposal for the maintenance of herself *and* her children" (c), or "for his own use and benefit, *and* the maintenance and education of his children" (d), [or "for their own use and support of their children" (e)], or "at the disposal of the legatee for herself *and* her children" (f), or "all overplus towards her support *and* her family" (g), or to A. "for the education and advancing in life of her children" (h), [or to A. "and the said tenement I leave to the disposal of her, with a view that the said tenement may be disposed of as she may think proper for the maintenance and education of my two daughters" (i).] In a recent case (j), it was held that the circumstance of a trustee being interposed, instead of the property being given directly to the parent, was sufficient to show that no sub-trust was intended, but this view appears not to be supported by earlier decisions (k).

13. *Nature of such a trust.* — Where a trust is created, the person bound by it is the hand to administer it, and can sign

[(g) *Farr v. Hennis*, 44 L. T. N. S. 202.]

(h) *Fox v. Fox*, 27 Beav. 301.

(i) *Scott v. Key*, 35 Beav. 291.

(a) *Mackett v. Mackett*, 14 L. R. Eq. 49.

(b) *Raikes v. Ward*, 1 Hare, 445.

(c) *Scott v. Key*, 35 Beav. 291.

(d) *Longmore v. Elcum*, 2 Y. & C. Ch. Ca. 369; *Carr v. Living*, 28 Beav. 644; *Berry v. Briant*, 2 Drew. & Sm. 1; *Bird v. Maybury*, 33 Beav. 351.

[(e) *Dixon v. Dixon*, W. N. 1876, p. 225.]

(f) *Crockett v. Crockett*, 1 Hare, 461; and see S. C. 2 Phil. 461; *Bibby v. Thompson* (No. 1), 32 Beav. 646.

(g) *Woods v. Woods*, 1 M. & Cr. 401.

(h) *Gilbert v. Bennett*, 10 Sim. 371.

[(i) *Talbot v. O'Sullivan*, 6 L. R. Ir. 302.]

(j) *Byne v. Blackburn*, 26 Beav. 41.

(k) *Gilbert v. Bennett*, 10 Sim. 371; *Longmore v. Elcum*, 2 Y. & C. C. C. 363; and see *Carr v. Living*, 20 Beav. 644.

a valid receipt for the fund, the subject of the trust (*l*). And the person bound by the trust is regarded in the same light as a committee of a lunatic, or guardian of an infant (*m*), that is, he has a duty imposed upon him; but so long as he discharges that duty, he is entitled to the surplus for his own benefit, and the Court requires from him no account retrospectively of the application of the fund (*n*), and allows him prospectively to propose any reasonable arrangement how the object of the trust may be accomplished (*o*), or will order payment to him on his *un- [*139]dertaking to maintain the children properly, with liberty to the children to apply (*a*). Should the person bound by the trust become by misconduct unfit to maintain and educate the children, the Court will not allow him to receive the fund (*b*); and should the fiduciary assign his interest, the Court will inquire what part is needed for the maintenance and education of the children, and will give the surplus only to the assignee (*c*).

14. **Forisfamiliation.** — It follows from these principles that if there be no children born (*d*), or if they have since died (*e*), the person bound by the trust takes the whole produce for his own benefit. So the children lose their claim if they become forisfamiliated, *i.e.*, cease to be members of or to belong to the establishment contemplated by the testator, as if a child marry (*f*), or under other circumstances maintain a separate establishment (*g*), for it can scarcely be sup-

(*l*) *Woods v. Woods*, 1 M. & Cr. 409, *per* Lord Cottenham; *Raikes v. Ward*, 1 Hare, 449, *per* V. C. Wigram; *Cooper v. Thornton*, 3 B. C. C. 186; *Robinson v. Tickell*, 8 Ves. 142; *Crockett v. Crockett*, 1 Hare, 451, 2 Phil. 553; *Greene v. Greene*, 3 Ir. R. Eq. 102, *per cur.*; but see *Webb v. Wools*, 2 Sim. N. S. 272.

(*m*) As to the position of committees and guardians see *Jodrell v. Jodrell*, 14 Beav. p. 411–413.

(*n*) *Leach v. Leach*, 13 Sim. 304; *Browne v. Paull*, 1 Sim. N. S. 92; *Carr v. Living*, 28 Beav. 644; *Hora v. Hora*, 33 Beav. 88.

(*o*) *Raikes v. Ward*, 1 Hare, 450.

(*a*) *Crockett v. Crockett*, 1 Hare, 451; *Hadow v. Hadow*, 9 Sim. 438.

(*b*) *Castle v. Castle*, 1 De G. & J. 352.

(*c*) *Carr v. Living*, 28 Beav. 644; *Scott v. Key*, 35 Beav. 291.

(*d*) *Hammond v. Neame*, 1 Swans. 35; *Cape v. Cape*, 2 Y. & C. Ex. 543; *Re Main's Settlement*, 15 W. R. 216.

(*e*) *Bushnell v. Parsons*, Pr. Ch. 219.

(*f*) *Bowden v. Laing*, 14 Sim. 113; *Carr v. Living*, 28 Beav. 644; *Staniland v. Staniland*, 34 Beav. 536; *Massey v. Massey*, W. N. 1873, p. 76.

(*g*) See *Thorp v. Owen*, 2 Hare,

posed that the testator meant an income given with reference to one establishment, to be split into as many different incomes as there are children (*h*). But it has been said that if a daughter marry, and afterwards becomes a widow and has no support, the right to maintenance may revive (*i*).

15. **Attaining 21.**—Whether a child's right to maintenance will cease *ipso facto* by his or her attaining the age of twenty-one years, must depend, of course, upon the particular words used (*j*), but is open generally to some uncertainty (*k*). It can hardly be maintained, on the one hand, that when a child has attained majority, and is fairly launched into the world, and is making a livelihood, the trust is to continue (*l*); and, on the other hand, if a child be willing to remain at home, and no reasonable objection can be made to it, the person bound by the trust cannot refuse maintenance on the mere ground that the child has attained twenty-one (*m*).

16. **Case of tenant for life bound by such a trust with remainder over.**—If a person be entitled for life for the maintenance of herself, and the maintenance and education of the testator's children, and *after her death the trust is for the children absolutely, a child on coming of age cannot, even with the concurrence of the tenant for life, call for a transfer of a proportionate share of the property, if this diminution of the fund would endanger the right of the other children to be properly maintained and educated during the tenancy for life. The Court in such a case has adopted the expedient that a *part* of the child's share should be paid out on his undertaking to account for the income of it, and on the footing that the residue of the share should be retained as a security for the due payment of the income (*a*). Where there was a clear trust for the

612; Longmore v. Elcum, 2 Y. & C. C. C. 370; Wilson v. Bell, 4 L. R. Ch. App. 581.

(*h*) See Thorp v. Owen, 2 Hare, 613.

(*i*) Scott v. Key, 35 Beav. 291; [Wilkins v. Jodrell, 13 Ch. D. 564, 573.]

(*j*) See the cases reviewed by V. C. Wood in Gardner v. Barber, 18 Jur. 508.

(*k*) Longmore v. Elcum, 2 Y. & C. C. C. 370; Thorp v. Owen, 2 Hare, 610.

(*l*) See Thorp v. Owen, 2 Hare, 612; Carr v. Living, 28 Beav. 644.

(*m*) See Carr v. Living (No. 2), 33 Beav. 474; Thorp v. Owen, 2 Hare, 613; Scott v. Key, 35 Beav. 291.

(*a*) Berry v. Briant, 2 Dr. & Sm. 1.

maintenance of the children, the Court reserved the consideration of what would be the rights of the parties after the parent's death, and gave liberty to apply on that event (b).

17. **Charge of debts, &c., in a will**—To proceed with the instances of implied trusts, if a person by will direct his realty to be sold, or charge it with debts and legacies (c), or with any particular legacy (d), the legal estate may descend to the heir, or it may pass to a devisee; but the Court will view the direction as an implied declaration of trust, and will enforce the execution of it against the legal proprietor.

18. **Conditions construed as trusts**.—So, in many cases, if a person devise an estate with words of condition annexed, the conditional words are not construed to impose a legal forfeiture on breach so as to give a right of entry, but are viewed as trusts affecting the conscience of the owner, and so enforceable in a Court of Equity; as if a house be devised to A. for life, "he keeping the same in repair," or if an estate be given to A. in fee, "he paying the testator's debts within twelve months from the testator's death" (e).

19. **Agreement for valuable consideration**.—Again, if a person agree for valuable consideration to settle a specific estate, he thereby becomes a trustee of it for the intended objects, and all the consequences of a trust will follow (f); *and so if he covenant to charge all lands [*141] that he may possess at a particular time (a), or at any

(b) *Scott v. Key*, 35 Beav. 291.

(c) *Pitt v. Pelham*, 2 Freem. 184; S. C. 1 Ch. Rep. 283; *Locton v. Locton*, 2 Freem. 136; *Auby v. Doyl*, 1 Ch. Cas. 180; *Tenant v. Brown*, Ib.; *Garfoot v. Garfoot*, 1 Ch. Ca. 35; S. C. 2 Freem. 176; *Gwilliams v. Rowel*, Hard. 204; *Blatch v. Wilder*, 1 Atk. 420; *Carvill v. Carvill*, 2 Ch. Rep. 301; *Cook v. Fountain*, 3 Swans. 592; *Bennet v. Davis*, 2 P. W. 318; *Briggs v. Sharp*, 20 L. R. Eq. 317, &c.

(d) *Wigg v. Wigg*, 1 Atk. 382; [*Re Kirk*, 21 Ch. D. 481.]

(e) *Wright v. Wilkin*, 2 Best & Sm.

232; *Re Skingley*, 3 Mac. & G. 221; *Gregg v. Coates*, 23 Beav. 33; [*Foot v. Cunningham*, 11 L. R. Eq. 306; reversed *Cunningham v. Foot*, 3 App. Cas. 974;] but see *Kingham v. Lee*, 15 Sim. 396; *Kinnersley v. Williamson*, 39 L. J. N. S. Ch. 788; 18 W. R. 1016.

(f) *Finch v. Winchelsea*, 1 P. W. 277; *Fremoult v. Dedire*, ib. 429; *Kennedy v. Daly*, 1 Sch. & Lef. 355; *Legard v. Hodges*, 1 Ves. jun. 477; S. C. 3 B. C. C. 531; 4 B. C. C. 421; *Ravenshaw v. Hollier*, 7 Sim. 8.

(a) *Wellesley v. Wellesley*, 4 M.

time (*b*), he will be a trustee of such lands to the extent of the charge. And even if a person engages on his marriage to settle *all* the *personal* estate that he may acquire during the coverture, the trusts upon which it is so agreed the personalty shall be settled will fasten upon the property as it falls into possession; and if the money has been laid out in a purchase, it may be followed into the land (*c*). But if a person covenant to settle such property as he shall *die seised of*, he may dispose of his property as he pleases in his lifetime, and the covenant will affect only such property as he may leave after payment of his just debts (*d*); and if a person covenant to secure an annuity, *either* by a charge on freeholds, *or* by investment in the funds, *or* by the best means in his power, it will not create a charge on the covenantor's property generally (*e*).

20. **Contract for sale.**—Again, if a person contract to sell another an estate, the vendor has impliedly declared himself a trustee in fee for the purchaser, and is accountable to him for the rents and profits (*f*); and if the tenants have been allowed improperly to run in arrear (*g*), or there has been unhusbandlike farming (*h*), or any other injury done, either by the wilful waste or neglect of the vendor (*i*), he is answerable to the purchaser as for a breach of trust. On the other hand, if any damage arise to the estate, not by

& C. 561. As to the proper construction of the particular covenant in that case, see *Countess of Mornington v. Keane*, 2 De G. & J. 293.

(*b*) *Lyster v. Burroughs*, 1 Drury & Walsh, 149; *Stack v. Royse*, 12 Ir. Ch. Rep. 246; [*Cleary v. Fitzgerald*, 7 L. R. Ir. 229.]

(*c*) *Lewis v. Madocks*, 8 Ves. 150; S. C. 17 Ves. 48; [*Galavan v. Dunne*, 7 L. R. Ir. 144. But in case of the settlor's bankruptcy, see 46 & 47 Vict. c. 52, s. 47; *Ex parte Bolland*, 17 L. R. Eq. 115.]

(*d*) *Rowan v. Chute*, 13 Ir. Ch. Rep. 168; *Re M'Kenna*, ib. 239; *Nayler v. Wetherall*, 12 Jan. 1831; affirmed 23 Jan. 1833 (MS.); where the covenant was to settle all the real and personal

estate which he should be seised or possessed of at the time of his death, and it was declared that the covenant bound all the real and personal estate which he had power to dispose of by will.

(*e*) *Countess of Mornington v. Keane*, 2 De G. & J. 292; and see *Stock v. Moyse*, 12 Ir. Ch. Rep. 246.

(*f*) See *Acland v. Gaisford*, 2 Mad. 32; *Wilson v. Clapham*, 1 J. & W. 38.

(*g*) *Acland v. Gaisford*, 2 Mad. 28.

(*h*) *Ferguson v. Tadman*, 1 Sim. 530; *Foster v. Deacon*, 3 Mad. 394.

(*i*) *Wilson v. Clapham*, 1 J. & W. 39.

default of the vendor, as by fire (*j*), or dilapidations (*k*), the loss will fall on the purchaser; and if the accident by which the damage arises brings with it legal obligations which must be immediately * answered, and which [*142] the vendor satisfies, the expense thus incurred must be borne by the purchaser (*a*). But where pending the completion of a purchase of copyholds the trustee for sale died, and a new admittance became necessary, it was held that the expense of the fine must be borne by the trust estate (*b*). Should the estate become by any accident more valuable, the purchaser then will take the improvement (*c*). It should be observed, however, that the *vendor* is, after all, a trustee *sub modo* only, for he cannot be compelled to deliver up the possession until the purchase-money has been paid (*d*). And so the *purchaser* is only a *cestui que trust sub modo*, and he cannot enforce any equitable rights attached to the estate until the contract has been completed (*e*).

21. It would be endless to pursue implied trusts through all their ramifications; a subject so extensive that years might be passed in the study of equitable jurisprudence, without exhausting so ample a field; but the leading general principles by which the Courts are guided may be gathered sufficiently for our purpose from the few examples given.

(*j*) *Paine v. Meller*, 6 Ves. 349; *Harford v. Purrier*, 1 Mad. 539, *per* Sir T. Plumer; *Acland v. Gaisford*, 2 Mad. 32, *per eundem*. As to *Stent v. Bailis*, 2 P. W. 220, see *Paine v. Meller*, 6 Ves. 352.

(*k*) *Minchin v. Nance*, 4 Beav. 332.

(*a*) *Robertson v. Skelton*, 12 Beav. 280.

(*b*) *Paramore v. Greenslade*, 1 Sm. & Giff. 541.

(*c*) See *Harford v. Purrier*, 1 Mad. 539; *Revell v. Hussey*, 2 B. & B. 287; *Paine v. Meller*, 6 Ves. 352; *Spurrier v. Hancock*, 4 Ves. 667; *White v. Nutts*, 1 P. W. 61.

(*d*) See *Acland v. Gaisford*, 2 Mad. 32; *Wall v. Bright*, 1 J. & W. 494; *M'Creight v. Foster*, 5 L. R. Ch. App. 604.

(*e*) See *Tasker v. Small*, 3 M. & Cr. 70.

OF RESULTING TRUSTS.

Classification of trusts by operation of law.—HAVING discussed the various questions involved in the creation of trusts by the act of a party, we shall next direct our attention to the creation of trusts by operation of law. Trusts of this kind may be regarded as twofold, viz. 1. Resulting. 2. Constructive.

Subdivision of resulting trusts.—Resulting Trusts,¹ the subject of the present chapter, may be subdivided into the two

¹ **RESULTING TRUSTS.**—*Definition.*—There is a “class of trusts which result in law, from the acts of parties whether they intended to create a trust or not;” 1 Perry on Trusts, § 124. “In all species of resulting trusts intention is an essential element, although that intention is never expressed by any words of direct creation. There must be a transfer, and equity infers the intention that the transferee was not to receive and hold the legal title as the beneficial owner, but that a trust was to arise in favor of the party whom equity would regard as the beneficial owner under the circumstances;” 2 Pom. Eq. Jur. § 1031; 2 Story Eq. Jur. § 1195.

Title taken in name of one, consideration paid by another.—The most important as well as the most numerous class of resulting trusts arise in this way, the holder of the legal title becoming a trustee, another furnishing money; 1 Perry on Trusts, § 126; 2 Pom. Eq. Jur. § 1037; Williams v. Hollingsworth, 1 Strob. Eq. 103; 47 Am. Dec. 527; Baker v. Vining, 30 Me. 121; 50 Am. Dec. 617; Foote v. Colvin, 3 Johns. 216; 3 Am. Dec. 478; Jackson v. Matsdorf, 11 Johns. 91; 6 Am. Dec. 355; Strimpfner v. Roberts, 18 Pa. St. 283; 57 Am. Dec. 606; Lisloff v. Hart, 25 Miss. 245; 57 Am. Dec. 203; Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673; Jackson v. Miller, 6 Wend. 228; 21 Am. Dec. 316; Dudley v. Bosworth, 10 Humph. 9; 51 Am. Dec. 690; Pinnock v. Clough, 16 Vt. 500; 42 Am. Dec. 521; Lee v. Browder, 51 Ala. 288; Peabody v. Tarbell, 2 Cush. 227; Hampson v. Fall, 64 Ind. 332; Murphy v. Peabody, 63 Ga. 522; Blodgett v. Hildreth, 103 Mass. 484; Mershon v. Duer, 40 N. J. Eq. 333; Scheerer v. Scheerer, 100 Ill. 11; Laws v. Law, 76 Va. 527; Sherburne v. Morse, 132 Mass. 409; Lawry v. Spaulding, 73 Me. 31; Robinson v. Leflore, 59 Miss. 148; but see Minn. Statutes and Donlin v. Bradley, 119 Ill. 412. Payment must have been actually made, or an obligation to pay given, or no trust will be raised; 2 Pom. Eq. Jur. § 1037.

Part payment of consideration.—A trust results whether the title is taken in the name of one or two or more jointly, and payment of a part of the purchase-price will create a trust *pro tanto*, as two or more advance the money and the title is taken in the name of one; Case v. Codding, 38 Cal. 191; Dow

following classes: *First*, where an *owner* or person legally and equitably entitled makes a conveyance, devise, or be-

v. Jewell, 18 N. H. 340; 45 Am. Dec. 371; *Smith v. Smith*, 85 Ill. 189; *Smith v. Patton*, 12 W. Va. 541; *Somers v. Overhulser*, 67 Cal. 237; *Clark v. Clark*, 43 Vt. 685; *Frederick v. Haas*, 5 Nev. 389; *Springer v. Springer*, 114 Ill. 550. If a partial payment is made, it must be a definite aliquot part of the purchase-price; *Olcott v. Bynum*, 17 Wall. 44; *Thalman v. Canon*, 24 N. J. Eq. 127; *McGowan v. McGowan*, 14 Gray, 119; 74 Am. Dec. 668; *Fickett v. Durham*, 109 Mass. 422; *Snow v. Paine*, 114 Mass. 526; *Bresnihan v. Sheehan*, 125 Mass. 13; *Sayre v. Townsend*, 15 Wend. 647; *Baker v. Vining*, 30 Me. 121; *Green v. Drummond*, 31 Md. 71; *Smith v. Burnham*, 3 Sumn. 435; *Cutler v. Tuttle*, 4 C. E. Greene, 549; *Sanderson v. McKercher*, 13 A. R. (Ont.) 561. It has been held that, in the absence of proof, there is a presumption that joint purchasers paid equal amounts; *Shoemaker v. Smith*, 11 Humph. 81; if it appears that the payments by the parties are unequal, the trust results to them proportionately; *Buck v. Swazey*, 35 Me. 41; *Kelley v. Jenness*, 50 Me. 455; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Hall v. Young*, 37 N. H. 134; *Botsford v. Burr*, 2 John. Ch. 405; *Pierce v. Pierce*, 7 B. Mon. 433; *McDonald v. McDonald*, 24 Ind. 68.

Purchaser having a fiduciary character.—If a trustee purchases with trust funds and takes the title to himself a trust results to his beneficiary; *McLarren v. Brewer*, 51 Me. 402; *Handcock v. Titus*, 33 Miss. 224; *Neill v. Keese*, 13 Tex. 187; 51 Am. Dec. 746; *Moffitt v. McDonald*, 11 Hump. 457; *Sutherland v. Meehan*, 3 Pug. (N. B.) 239; likewise if a guardian purchase with money of his ward; *Bancroft v. Consen*, 13 Allen, 50; *Lee v. Fox*, 6 Dana, 171; *Coles v. Allen*, 64 Ala. 98; *Broyles v. Nowlin*, 59 Tenn. 191; but not if the guardian uses his own money; *Johnson v. Dougherty*, 3 Green. Ch. 406; *French v. Sheplor*, 83 Ind. 266; 43 Am. Rep. 67; *Kisler v. Kisler*, 2 Watts, 323. A trust will result if an executor or administrator purchase in his own name with estate funds; *Wallace v. Duffield*, 2 Serg. & R. 521; 7 Am. Dec. 660; *Dodge v. Cole*, 97 Ill. 338; *Harper v. Archer*, 28 Miss. 212; *Barker v. Barker*, 14 Wis. 131; likewise if an agent purchase in his own name with funds of his principal; *Church v. Sterling*, 16 Conn. 388; *Cookson v. Richardson*, 69 Ill. 137; *Chastain v. Smith*, 30 Ga. 96; *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291; *Hall v. Sprigg*, 7 Martin, 243; 12 Am. Dec. 506; *Brown v. Dwellley*, 45 Me. 62; *Safford v. Hynds*, 39 Barb. 625; *Smith v. Boquet*, 27 Tex. 507; *Pindall v. Trevor*, 30 Ark. 249; but not if agent uses his own money; *Nestal v. Schmid*, 29 N. J. Eq. 458; *Burden v. Sheridan*, 36 Ia. 125; 14 Am. Rep. 506; see also *Rose v. Hayden*, 35 Kan. 106; 57 Am. Rep. 145; or trustees of a corporation; *Church v. Wood*, 5 Ham. 283; or guardians or trustees of lunatics; *Hamnett's App.* 72 Pa. St. 337; *Reid v. Fitch*, 11 Barb. 399; *Stratton v. Dialogue*, 16 N. J. Eq. 70; or a partner purchasing in his own name with firm funds; *Lefevre's App.* 69 Pa. St. 122; 8 Am. Rep. 229; *Jenkins v. Frink*, 30 Cal. 586; *Phillips v. Crammond*, 2 Wash. C. C. 441; *Richards v. Manson*, 101 Mass. 482; *Trephegn v. Burt*, 67 N. Y. 30; or if a husband purchase in his own name with the separate funds of his wife; *Pritchard v. Wallace*, 4 Sneed, 405; 70 Am. Dec. 254; *Sasser v. Sasser*, 73 Ga. 275; *Rupp's App.* 100 Pa. St. 531; *Goldsberry v. Gentry*, 92 Ind. 193; *Boyer v. Libey*, 88 Ind. 235; *English v. Law*, 27 Kan. 242; *Tilford v. Torrey*, 53 Ala. 120; *Woodford v. Stephens*, 51 Mo. 443; *Fischbeck v. Gross*, 112 Ill. 208; *Bigley v. Jones*, 114 Pa. St. 510; but not if money did not belong to her separate estate; *Modrell v. Riddle*, 82 Mo. 31; nor if he use his own money, intending to replace it with hers after-

quest of the legal estate, and there is no ground for the inference that he meant to dispose of the equitable; and,

ward; *Crutcher v. Taylor*, 66 Ala. 217. A trust may result to the husband as well as to the wife; *Harden v. Darwin*, 66 Ala. 55; *Gogherty v. Bennett*, 37 N. J. Eq. 87; if a widow purchase in her own name with estate funds a trust results to the children; *Musham v. Musham*, 87 Ill. 80; *Fox v. Doherty*, 30 Ia. 334; or a father with funds of his children; *Robinson v. Robinson*, 22 Ia. 427. A trust results if the husband purchase with the savings of the wife's separate property, but not if from an allowance made by him; *Merrill v. Smith*, 37 Me. 394; *Farley v. Blood*, 10 Foster, 354; it is not at all necessary, however, that any fiduciary relation should exist; *Beck v. Uhrich*, 13 Pa. St. 636; 53 Am. Dec. 507.

Following funds.—It is sufficient if the general character of the fund can be identified; *United States v. Waterborough, Davies*, 164; *Overseers v. Bank*, 2 Gratt. 544; and they can be followed so long as definitely traceable; *Moore v. Stinson*, 144 Mass. 594; *In re Youngs*, 5 Dema. (N. Y.) 141; *Allen v. Russell*, 78 Ky. 106; *East v. McPherson*, 98 Ill. 496; *McGivney v. McGivney*, 142 Mass. 156; see also *Hunter v. Yarborough*, 92 N. C. 68; *Mason v. Commerce Bank*, 16 Mo. App. 275. If funds cannot be followed in hands of executor, legatees have no preference; *Thompson's App.* 22 Pa. St. 16. Burden is on trustee to show how much he added, of his own, to trust estate; *Persch v. Quiggle*, 57 Pa. St. 247; *Seaman v. Cook*, 14 Ill. 505. No trust results if one appropriate the funds of one to whom he does not stand in a fiduciary relation; *Hawthorne v. Brown*, 3 Sneed, 462. It was held that no fiduciary relation existed in case of a clerk in a store; *Campbell v. Drake*, 4 Ired. 94; *Pascoag Bank v. Hunt*, 3 Edw. 583; but the opposite was held in the case of a bank clerk; *Bank of America v. Pollock*, 4 Edw. 215; *Riehl v. Foundry Asso.* 104 Ind. 70.

Personal property.—The same rules apply to personal property as to realty; *Creed v. Bank*, 1 Ohio St. 1; *Kelley v. Jenness*, 50 Me. 465; unless it be of a perishable nature; *Bank v. Baker*, 8 Humph. 447; *Guphill v. Isbell*, 1 Bailey's Law, 230; 19 Am. Dec. 675.

No trust results, if contrary to statute or public policy, in case of title in one payment by another.—2 Story Eq. Jur. § 1201; *Proseus v. McIntyre*, 5 Barb. 424; *Clos v. Boppe*, 23 N. J. Eq. 270; *Baldwin v. Campfield*, 4 Halst. 891; *Miller v. Davis*, 50 Mo. 572; a conveyance in fraud of creditors will not raise a trust for party seeking benefit; *Cutler v. Tuttle*, 19 N. J. Eq. 549; nor where an alien to avoid the law purchases in name of another; *Taylor v. Benham*, 5 How. 270; *Hubbard v. Goodwin*, 3 Leigh, 492; *Leggett v. Dubois*, 5 Paige, 114; 28 Am. Dec. 413; *Alsworth v. Cordtz*, 31 Miss. 32.

Trust must result eo instanti.—Payment or an obligation to pay must take place at the time of purchase, and no prior or subsequent payment will be sufficient, however clearly proven; 2 Pom. Eq. Jun. § 1037; *Brown v. Cave*, 23 S. C. 251; *Niver v. Crane*, 98 N. Y. 40; *Cross's App.* 97 Pa. St. 471; *Buck v. Pike*, 11 Me. 9; *Nixon's App.* 63 Pa. St. 282; *Botsford v. Burr*, 2 Johns. Ch. 408; *Page v. Page*, 8 N. H. 187; *White v. Carpenter*, 2 Paige, 218; *Jackson v. Moore*, 6 Cow. 706; *Gee v. Gee*, 2 Sneed, 395; *Kendall v. Mann*, 11 Allen, 15; *Barnard v. Jewett*, 97 Mass. 87; *Tunnard v. Littell*, 23 N. J. Eq. 264; *Gerry v. Stimson*, 60 Me. 186; if two agree to purchase, and one furnishes money and takes title, no trust results; *Fowke v. Slaughter*, 3 A. K. Marsh, 56; *Tebbetts v. Tilton*, 31 N. H. 273; there must be an actual payment, or the equivalent; *Dudley v. Bachelder*, 53 Me. 403; *Roberts v. Ware*, 40 Cal. 634; no

Secondly, Where a *purchaser* of property takes a conveyance of the legal estate in the name of a third person, but there is nothing to indicate an intention of not appropriating to himself the beneficial interest.

trust results to one paying the purchase-money by way of a loan; *Whaley v. Whaley*, 71 Ala. 169; *Gibson v. Foote*, 40 Miss. 788; *White v. Carpenter*, 2 Paige, 217; otherwise if one taking the title should pay the money entirely for the credit of another; *Stucky v. Stucky*, 30 N. J. Eq. 546; *Fleming v. McHale*, 47 Ill. 282.

Advancements. — When a purchase is made by one who is legally and morally bound to support the one to whom the title is taken, no trust results, and there is a presumption that the conveyance was a gift or advancement to the nominal purchaser, as a purchase by a husband in the name of his wife; *Whitten v. Whitten*, 3 Cush. 194; *Creswell v. Jones*, 68 Ala. 420; *Bennett v. Camp*, 54 Vt. 36; *Spring v. Hight*, 22 Me. 408; *Fatheree v. Fletcher*, 31 Miss. 265; *Guthrie v. Gardner*, 19 Wend. 414; *Maxwell v. Maxwell*, 109 Ill. 588; see also *Mosely v. Mosely*, 87 N. C. 69; *Meredith v. Bank*, 92 Ind. 343; a father in the name of his son unprovided for; *Ford v. Ellingwood*, 3 Met. Ky. 359; *Stanley v. Brannon*, 6 Blakf. 195; *Dudley v. Bosworth*, 10 Humph. 12; 51 Am. Dec. 690; *Douglass v. Brice*, 4 Rich. Eq. 322; *Wheeler v. Kidder*, 106 Pa. St. 270; *James v. James*, 41 Ark. 301; *McGinnis v. Edgell*, 39 Ia. 419; *Read v. Huff*, 40 N. J. Eq. 229; *Harden v. Darwin*, 66 Ala. 55; *Buren v. Buren*, 79 Mo. 538; in the name of daughter; *Eastham v. Roundtree*, 56 Tex. 110; *Murphy v. Nathans*, 46 Pa. St. 508; or adopted daughter; *Astreen v. Flanagan*, 3 Edw. Ch. 279; likewise if purchase is made in the name of wife and others; *Stevens v. Stevens*, 70 Me. 92; *Cormerais v. Wesselhoeft*, 114 Mass. 550; *Seibold v. Christman*, 75 Mo. 308; *Jencks v. Alexander*, 11 Paige, 619; *Johnson v. Johnson*, 16 Minn. 512; also if the one paying the consideration stands in *loco parentis* to the nominal purchaser, as father and son-in-law; *Baker v. Leathers*, 3 Ind. 558; *Thompson v. Thompson*, 18 Ohio St. 73; father and illegitimate son; *Beckford v. Beckford*, Loft, 490; brother and sister; *Higdon v. Higdon*, 57 Miss. 204; uncle and nephew; *Jackson v. Feller*, 2 Wend. 465; husband and wife's nephew; *Curran v. Jago*, 1 Coll. 261; but the rule does not apply to more distant relatives; *Tucker v. Burrow*, 2 Hem. & M. 515; *Powys v. Mansfield*, 3 Myl. & Cr. 359; one claiming an advancement must prove it; *Kluender v. Fenske*, 53 Wis. 118; this presumption of an advancement may be rebutted by evidence showing the intent of the real purchaser to secure a trust for himself; *Shepherd v. White*, 10 Tex. 72; *Cotton v. Wood*, 25 Iowa, 43; *Jackson v. Matsdorf*, 11 Johns. 96; 6 Am. Dec. 355; *Proseus v. McIntyre*, 5 Barb. 432; *Hodgson v. Macy*, 8 Ind. 121; *Butler v. M. Ins. Co.* 14 Ala. 788; *Reed v. Huff*, 40 N. J. Eq. 229; *Seibold v. Christman*, 75 Mo. 308.

Conveyance of legal title only. — In this case the equitable title will result to the settlor, his heirs, executors, or administrators; *Hogan v. Strayhorn*, 65 N. C. 279; *Barnes v. Taylor*, 27 N. J. Eq. 265; *Tipton v. Powell*, 2 Cold. 19; *Gibson v. Armstrong*, 7 B. Mon. 481.

Trust as to part only. — Where by will a trust is declared in a part only of an estate, or the purposes of the trust do not exhaust the beneficial interest, a trust in the remainder will result to the grantor, his heirs or representatives; 2 Story Eq. Jur. § 1199; 1 Perry on Trusts, § 152; *Loring v. Eliot*, 16 Gray, 568; *Kennedy v. Numan*, 52 Cal. 326; *Hogan v. Jaques*, 19 N. J. Eq. 123; *McCollister v. Willey*, 52 Ind. 382; there is a distinction between property

SECTION I.

OF RESULTING TRUSTS WHERE THERE IS A DISPOSITION OF THE
LEGAL AND NOT OF THE EQUITABLE INTEREST.

1. **General rule.**—The general rule is, that wherever, upon a conveyance, devise, or bequest, it appears that the grantee, devisee, or legatee was intended to take the legal

given expressly for a particular purpose and subject to a particular purpose; *Downer v. Church*, 44 N. Y. 647; *McElroy v. McElroy*, 113 Mass. 509; *Hale v. Horne*, 21 Gratt. 112; if it appear that the donee was not intended to receive an equitable interest, he will not; *King v. Mitchell*, 8 Pet. 349.

Where purpose of trust fails.—Where a trust to be declared never is declared or the objects or purposes of the trust fail a trust will result to the settlor; *Hawley v. James*, 5 Paige, 318; *Sturtevant v. Jaques*, 14 Allen, 526; *Shaw v. Spencer*, 100 Mass. 388; *Dillaye v. Greenough*, 45 N. Y. 438; *Pratt v. Beaupre*, 13 Minn. 187; *Kerlin v. Campbell*, 15 Pa. St. 500; *Easterbrooks v. Tillinghast*, 5 Gray, 17.

Trust for indefinite and uncertain purpose.—If too vague to be carried out, a trust results to the settlor, his heirs or representatives; 2 Pom. Eq. Jur. § 1032; *Nichols v. Allen*, 130 Mass. 211; *Shaw v. Spencer*, 100 Mass. 388; *Sturtevant v. Jaques*, 14 Allen, 526; *Hawley v. James*, 5 Paige, 318.

Lapse of time.—Mere lapse of time no bar if good excuse is given, but otherwise equity will not enforce after great delay; *Harris v. McIntyre*, 118 Ill. 275; after fifteen years should be most satisfactory; *Heneke v. Floring*, 114 Ill. 554; relief refused after three years; *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; see also *Midmer v. Midmer*, 26 N. J. Eq. 299; *Jennings v. Shacklett*, 30 Gratt. 765; *Kennedy v. Kennedy*, 25 Kan. 151; *Hennessey v. Walsh*, 55 N. H. 515; *Best v. Campbell*, 62 Pa. St. 478; *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371. See *post* Statute of Limitations.

Voluntary conveyance.—No trust results because of a conveyance without consideration; *Ownes v. Ownes*, 8 C. E. Green, 60; *Groff v. Rohrer*, 35 Md. 327; *Burt v. Wilson*, 28 Cal. 632; and parol is not admissible to control or contradict the consideration; *Philbrook v. Delano*, 29 Me. 410; *Randall v. Phillips*, 3 Mason, 388; *Rathbun v. Rathbun*, 6 Barb. 98; *Farrington v. Barr*, 36 N. H. 86; nor to vary or add to the written instrument; *Cairns v. Colburn*, 104 Mass. 274; *Gerry v. Stimson*, 60 Me. 186; *Blodgett v. Hildreth*, 103 Mass. 484; *Bartlett v. Bartlett*, 14 Gray, 278; *Leman v. Whitley*, 4 Russ. 423; *Sprague v. Woods*, 4 Watts & S. 192; a conveyance in fee with warranty estops the grantor from alleging an interest in the purchase-money which would raise a resulting trust to him; *Squire v. Harder*, 1 Paige Ch. 494; 19 Am. Dec. 446; *Philbrook v. Delano*, 29 Me. 410; creditors could avoid such a deed; *Baldwin v. Campfield*, 4 Halst. Ch. 891; *Dunnica v. Coy*, 28 Mo. 525; if made for a fraudulent or illegal purpose, no trust will result to the grantor; *Wilson v. Cheshire*, 1 McCord, Ch. 233; *Bryant v. Mansfield*, 22 Me. 300; *Muller v. Davis*, 50 Mo. 572; *Hutchins v. Heywood*, 50 N. H. 488; *Cutler v. Tuttle*, 19 N. J. Ch. 553.

Parol proof. Statute of Frauds.—The Statute of Frauds affects only trusts created or declared by the parties, and not those arising by operation of law; 1 Perry on Trusts, § 137; *Ward v. Armstrong*, 84 Ill. 151; *Black v. Black*, 4

estate merely, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself, or his heir, and, if out of personal estate, to himself or his executor.

Pick. 238; Foote v. Bryant, 47 N. Y. 544; Judd v. Moseley, 30 Ia. 423; Smith v. Sackett, 5 Gilm. 544; Ross v. Hegeman, 2 Edw. Ch. 373; Osborne v. Endicott, 6 Cal. 140; excepted by statutes in most states, but not necessary; Hoxie v. Carr, 1 Sumn. 187; a parol trust accompanied by nothing to create a resulting trust falls within the statute; Smith v. Hollenback, 51 Ill. 223. Where a trust arises in favor of one paying the purchase-price parol is admissible to establish the facts necessary to create it or the transactions out of which it results; Rhea v. Tucker, 56 Ala. 450; Baker v. Vining, 30 Me. 126; Smith v. Patton, 12 W. Va. 541; Miller v. Blose, 30 Gratt. 744; Witts v. Hooney, 59 Md. 584; Irwin v. Ivers, 7 Ind. 308; 63 Am. Dec. 421; Smitheal v. Gray, 1 Humph. 491; 34 Am. Dec. 664; see Rose v. Gibson, 71 Ala. 35; a person claiming a trust in his favor, by parol may prove payment by himself, although the deed recites payment by the grantee; Livermore v. Aldrich, 5 Cush. 435; Bayles v. Baxter, 22 Cal. 575; De-peyster v. Gould, 2 Green Ch. 474; though, by fraud or mistake, the holder of the legal title claims that he holds it for the grantor, or some one else, or a sworn answer denies the facts, yet parol is admissible in opposition; Hanson v. Church, 1 Stockt. 441; Cotton v. Wood, 25 Ia. 43; Boyd v. M'Lean, 1 John. Ch. 582; Moore v. Moore, 38 N. H. 382; Letcher v. Letcher, 4 J. J. Marsh, 590; even after the death of the nominal purchaser; Williams v. Hollingsworth, 1 Strob. Eq. 103; 47 Am. Dec. 527; Freeman v. Kelly, 1 Hoff. 98; Dudley v. Bosworth, 10 Humph. 9; but all the facts must be clearly set out in the bill; Rowell v. Freese, 23 Me. 182; Hickey v. Young, 1 J. J. Marsh, 1. Parol evidence must be full, clear, convincing, and leave no room for doubt; Whitmore v. Learned, 70 Me. 276; Parker v. Snyder, 31 N. J. Eq. 164; Thomas v. Standiford, 49 Md. 181; Hyden v. Hyden, 6 Baxt. 406; Lee v. Browder, 51 Ala. 288; Agricultural Asso. v. Brewster, 51 Tex. 257; Boyd v. M'Lean, 1 Johns. Ch. 582; Rogers v. Rogers, 87 Mo. 257; Green v. Dietrich, 114 Ill. 636; Laughlin v. Mitchell, 14 Fed. Rep. 382; Allen v. Withrow, 110 U. S. 119; Hollida v. Shoop, 4 Md. 465; 59 Am. Dec. 88; Saylor v. Plaine, 31 Md. 158; evidence of payment by one not the grantee is sufficient; Connor v. Follansbee, 59 N. H. 124; controlling fact is the ownership of the purchase-money; Shaw v. Shaw, 86 Mo. 594; for cases of quitclaim, see Gove v. Learoyd, 140 Mass. 524; Beadle v. Beadle, 2 McCrary, C. C. 586; parol declarations of the nominal grantee that another paid the consideration, may be used against him; Malin v. Malin, 1 Wend. 626; Harder v. Harder, 2 Sandf. 17. The presumption that a resulting trust arises may be rebutted by parol showing that no trust was intended; Adams v. Guerard, 29 Ga. 651; 76 Am. Dec. 625; Steere v. Steere, 5 Johns. Ch. 19; 9 Am. Dec. 266; Page v. Page, 8 N. H. 195; Carter v. Montgomery, 2 Tenn. Ch. 216; Tryon v. Huntoon, 67 Cal. 325; Warren v. Steer, 112 Pa. St. 634; Hunt v. Moore, 6 Cush. 1; Baker v. Vining, 30 Me. 121; this applies to a part, as well as to the whole, of the subject-matter; Pinney v. Fellows, 15 Vt. 525; but a different construction from that intended cannot subsequently be put upon the transaction; Robles v. Clarke, 25 Cal. 317; White v. Sheldon, 4 Nev. 280.

Parol evidence is inadmissible in the other classes of resulting trusts, as where a conveyance is made in trust for a certain purpose, which is indefinite

2. **Chattel interest in real estate results to heir's personal representatives.**—Should the interest resulting, as a remnant of the real estate, to the heir be of a chattel nature, as a term of years, or a sum of money, it will on the death of the heir, devolve on *his* personal representative (a).

[*144] *3. **Of trusts resulting by presumption.**—The settlor's intention of excluding the person invested with the legal estate from the usufructuary enjoyment, may either be *presumed* by the Court, or be actually *expressed* upon the instrument.

4. **Whether trust will result where no trust declared of any part.**—If an estate be granted either without consideration

(a) *Levet v. Needham*, 2 Vern. 138; *rett v. Buck*, 12 Jur. 771. See *Hal-wych v. Packington*, 3 B. P. C. 44; *ford v. Stains*, 16 Sim. 448. *Sewell v. Denny*, 10 Beav. 315; Bar-

and uncertain, or is illegal, or which fails, or where the trust is in a part only, or the conveyance is made without any consideration. The intention that a trust is to result must appear expressly or by implication from the instrument itself. In case of a will no parol is admissible to show the intention, and the same is true of a deed except in case of fraud, accident, or mistake; 2 Pom. Eq. Jur. § 1036; *Squires v. Harder*, 1 Paige, 494; 19 Am. Dec. 446; *Russ v. Mebius*, 16 Cal. 350; *Leman v. Whitley*, 4 Russ. 423.

Resulting trusts are executed by the transfer of the title by the trustee to the *cestui que trust* at the latter's request; *Millard v. Hathaway*, 27 Cal. 119; for cases where the trustee has incurred expense or made improvements, see *Maloy v. Sloans*, 44 Vt. 311; *Rines v. Bachelder*, 62 Me. 95; *Bodwell v. Nut-ter*, 63 N. H. 446.

For cases of resulting trusts in the provinces, see *Timmus v. Surples*, 26 C. P. 49; *Grace v. MacDermott*, 13 Chy. 247; *Secord v. Costello*, 17 Chy. 328; *McDonald v. McMillan*, 14 Chy. 99; *Hoig v. Gordon*, 17 Chy. 599; *Owen v. Kennedy*, 20 Chy. 163; *Wilde v. Wilde*, 20 Chy. 521; *Street v. Hallett*, 21 Chy. 255; *Knox v. Traver*, 24 Chy. 477; *Wilson v. Owens*, 26 Chy. 27.

In the province of Ontario, a deed being executed through misunderstanding of the grantor as to its effect, a resulting trust arose; *Grace v. McDermott*, 13 Chy. 247; administratrix deposited children's shares of property with her brother, he becoming a trustee for them; *Secord v. Costello*, 17 Chy. 328; nephew taking title at sale, without paying price, was declared a trustee; *McDonald v. McMillan*, 14 Chy. 99; woman living with a married man paid for land conveyed to him, and a trust resulted to her; *Hoig v. Gordon*, 17 Chy. 599; but see *Street v. Hallett*, 21 Chy. 255; land conveyed to wife, paid for by joint efforts of the whole family, raised a resulting trust in the husband; *Owen v. Kennedy*, 20 Chy. 163; when there is a failure to support a trust by parol, a resulting trust cannot be maintained; *Wilde v. Wilde*, 20 Chy. 521; if money is advanced by the father and title taken to the son, there is a presumption of an advancement and no trust results; *Knox v. Traver*, 24 Chy. 477; where no consideration passes, a trust arises by operation of law; *Wilson v. Owens*, 26 Chy. 27.

or for merely a nominal one (*a*), and no trust is declared of *any part*, then if the conveyance be simply to a *stranger and no intention appear of conferring the beneficial interest*, as the law will not suppose a person to part with property without some inducement thereto, a trust of the *whole estate* (as in the analogous case of uses before the statute of Henry VIII.) will result to the settlor (*b*). And if two joint tenants make such a conveyance without consideration, the equitable interest will result to them in joint tenancy (*c*).

5. *Case of wife or child*.—If the conveyance be to a *wife* (*d*) or *child* (*e*) it will be presumed an advancement, and the wife or child will be entitled beneficially.

6. In a case where a son conveyed an estate to his father, as purchaser on the face of the deed, for the sum of £400, and then filed a bill against the devisees of the father for a re-conveyance, on the ground that the son never intended to part with the beneficial interest, but meant only to facilitate the raising of a sum upon mortgage by means of this machinery, Sir J. Leach held, that since the Statute of Frauds parol evidence was inadmissible to prove a trust for the son, and that as there was no fraud or misapprehension, but the meaning was that the father should exercise towards the world at large the beneficial ownership, there was no resulting or constructive trust, and that the devisees must keep the estate. But the Court decreed the son as the ostensible

(*a*) See *Hayes v. Kingdome*, 1 Vern. 33; *Sculthorp v. Burgess*, 1 Ves. jun. 92.

(*b*) *Duke of Norfolk v. Browne*, Pr. Ch. 80; *Warmen v. Seamen*, 2 Freem. 308, *per Cur.*; *Hayes v. Kingdome*, 1 Vern. 33; *Grey v. Grey*, 2 Sw. 598; *per Lord Nottingham*; *Elliot v. Elliot*, 2 Ch. Ca. 232, *per eundem*; *Attorney-General v. Wilson*, 1 Cr. & Phil. 1; and see *Sculthorp v. Burgess*, 1 Ves. jun. 92; *Lady Tyrrell's case*, 2 Freem. 304; *Ward v. Lant*, Pr. Ch. 182; *Davies v. Otty* (No. 2), 35 Beav. 208. But in *Lloyd v. Spillet*, 2 Atk. 150, and *Young v. Peachey*, *ib.* 257, Lord Hardwicke was apparently of opinion that, since

the Statute of Frauds, there are only two cases of resulting trust, viz.: 1st, Where an estate is purchased in the name of a stranger; and 2ndly, Where on a voluntary conveyance a trust is declared of part, in which case the residue results. It would seem to follow that, in his opinion, should a voluntary conveyance be made and no trust at all be expressed, the grantee would take the beneficial interest to his own use; and see *Hutchins v. Lee*, 1 Atk. 447.

(*c*) *Rex v. Williams, Bunbury*, 342.

(*d*) See *Christ's Hospital v. Budgin*, 2 Vern. 683.

(*e*) *Jennings v. Sellick*, 1 Vern.

vendor to have a lien upon the property for the £400, [*145] as for unpaid purchase * money (a). However, in a similar case of absolute sale upon the face of the deed, but where the grantee afterwards admitted himself in writing to be a trustee, Lord Kenyon held that, as the written evidence established facts inconsistent with the deed, further evidence by parol was admissible to prove the truth of the transaction (b).

7. **Mistake or fraud.** — Of course the Court will not permit the grantee to retain the beneficial interest if there was any mistake on the part of the *grantor* (c), or any *mala fides* on the part of the *grantee* (d). But if the *grantor* himself intended a *fraud* upon the law, the assurance, if the defendant set up the defence, will remain absolute against the grantor (e); but if the defendant admit the trust, it seems the Court will relieve (f).

8. **Addition to a trust fund.** — If a person invest a sum in the names of the trustees of his marriage settlement, no trust will result, the presumption being that he meant it to be held upon the trusts of the settlement (g); and Sir J. Bacon once observed generally, that in marriage settlements the resulting trust was not in favour of the settlor (h), meaning it is conceived that the presumption of making provision for the persons marrying and their issue, was strong enough in certain cases to prevail against the general rule. [But

467; *Grey v. Grey*, 2 Swans. 598, *per* Lord Nottingham; *Elliot v. Elliot*, 2 Ch. Ca. 232, *per eundem*; and see *Hayes v. Kingdome*, 1 Vern. 33; *Baylis v. Newton*, 2 Vern. 28; *Cook v. Hutchinson*, 1 Keen, 42.

(a) *Leman v. Whitley*, 4 Russ. 423.

(b) *Cripps v. Jee*, 4 B. C. C. 472.

(c) *Birch v. Blagrove*, Amb. 264; *Anon.*, cited *Woodman v. Morrell*, 2 Freem. 33; *Childers v. Childers*, 1 De G. & Jon. 482; *Manning v. Gill*, 13 L. R. Eq. 485; *Davies v. Otty* (No. 2), 35 Beav. 208; and see *Attorney-General v. Poulden*, 8 Sim. 472.

(d) *Lloyd v. Spillet*, 2 Atk. 150;

S. C. Barn. 388, *per* Lord Hardwicke; *Hutchins v. Lee*, 1 Atk. 448, *per eundem*; *Young v. Peachy*, 2 Atk. 254; *Wilkinson v. Brayfield*, cited ib. 257; S. C. reported 2 Vern. 307; *Davies v. Otty* (No. 2), 35 Beav. 208.

(e) *Cottington v. Fletcher*, 2 Atk. 156, *per* Lord Hardwicke; and see *Chaplin v. Chaplin*, 3 P. W. 233; *Muckleston v. Brown*, 6 Ves. 68.

(f) See *Cottington v. Fletcher*, *Muckleston v. Brown*, *ubi supra*.

(g) *Re Curteis's Trust*, 14 L. R. Eq. 217.

(h) *Rainy v. Ellis*, W. N. 1872, p. 104; [and see S. C. 26 L. T. N. S. 602, and on appeal 27 L. T. N. S. 463.]

where by a marriage settlement the intended wife's father settled property upon trust for the intended husband for life, and then for the intended wife for life, and then for the children of the marriage, but the trusts for the children were void for remoteness, Kay, J., held that there was a resulting trust for the settlor (*i*).]

9. **Transfer of chattels.** — It was said in one case that if a man transfer *stock* or deliver *money* to another, it must proceed from an intention to benefit that other person, and therefore, although he be a stranger, it shall be *prima facie* a gift (*j*); but if such an intention cannot be inferred consistently with the attendant circumstances, a trust will result (*k*). * And even where there is a gift of [*146] stock by transfer into the joint names of the settlor and a stranger, still in this, as in other similar cases, the settlor retains the beneficial interest for his life (*a*).

10. **Where a trust is declared of part of the estate, the trust of the residue results.** — If upon a conveyance (*b*), devise (*c*), or bequest (*d*), a trust be declared of *part* of the estate, and nothing is said as to the residue, then, clearly, the creation of the partial trust is regarded as the sole object in view, and the equitable interest undisposed of by the settlor will result to him or his representative.

11. **Partial declaration of trust distinguished from a charge.** — But upon this subject a distinction must be observed be-

[(*i*) *Re Nash's Settlement*, 51 L. J. N. S. Ch. 511.]

(*j*) *George v. Howard*, 7 Price, 651, 653; and see *Batstone v. Salter*, 19 L. R. Eq. 250; 10 L. R. Ch. App. 431.

(*k*) See *Custance v. Cunningham*, 13 Beav. 363; *Fowkes v. Pascoe*, 10 L. R. Ch. App. 343.

(*a*) *Fowkes v. Pascoe*, 10 L. R. Ch. App. 343, see 351.

(*b*) *Northern v. Carnegie*, 4 Drew. 587; *Cottingham v. Fletcher*, 2 Atk. 155; *Culpepper v. Aston*, 2 Ch. Ca. 115; *Cook v. Gwavas*, cited *Roper v. Radcliffe*, 9 Mod. 187; *Lloyd v. Spillet*, 2 Atk. 150; S. C. Barn. 888, *per* Lord Hardwicke.

(*c*) *Sherrard v. Lord Harborough*, Amb. 165; *Marquis of Townshend v. Bishop of Norwich*, cited *Sanders on Uses*, C. 3, s. 7, div. 3; *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Nash v. Smith*, 17 Ves. 29; *Wych v. Packington*, cited *Roper v. Radcliffe*, 9 Mod. 187; *Davidson v. Foley*, 2 B. C. C. 203; *Kiricke v. Bransby*, 2 Eq. Ca. Ab. 508; *Levet v. Needham*, 2 Vern. 138; *Halliday v. Hudson*, 3 Ves. 210; *Kellett v. Kellett*, 3 Dow, 248; *Hall v. Waterhouse*, W. N. 1867, p. 11; &c.

(*d*) *Robinson v. Taylor*, 2 B. C. C. 589; *Mapp v. Elcock*, 2 Phill. 793; affirmed on appeal, 3 H. L. Cas. 492; *Read v. Stedman*, 26 Beav. 495;

tween a devise to a person for a particular purpose with no intention of conferring the beneficial interest, and a devise with the view of conferring the beneficial interest, but subject to a particular injunction. Thus, if lands be devised to A. and his heirs *upon trust to pay debts*, this is simply the creation of a trust, and the residue will result to the heir; but if the devise be to A. and his heirs *charged with debts*, the intention of the testator is to devise beneficially subject to the charge, and then whatever remains, after the charge has been satisfied, will belong to the devisee (e).

12. **No positive rule to be laid down.**—No positive rule can be laid down in what cases the devise will carry with it a beneficial character, and in what it will be construed a trust; but on all occasions the Court, refusing to be governed by mere technical phraseology, extracts the probable intention of the settlor from the general scope of the instrument (f).

13. **Relationship of the devisee or legatee.**—The recognition of the *relationship* of the parties has often materially influenced the Court against the construction of a mere trust (g); as, where a testator gave 5*l.* to his brother, [*147] who was his *heir-at-law, and “made and constituted *his dearly beloved wife* his sole heiress and executrix to sell and dispose thereof at her pleasure, and to pay his debts and legacies;” and Lord King decreed the devisee to be beneficially entitled (a). But any allusion of this kind is merely one circumstance of evidence, and therefore to be counteracted by the language of the other parts of the instrument (b).

Bird v. Harris, 9 L. R. Eq. 204; and see *Dawson v. Clarke*, 18 Ves. 254; *Williams v. Arkle*, 7 L. R. H. L. 606.

(e) *King v. Denison*, 1 V. & B. 272, per Lord Eldon.

(f) *Hill v. Bishop of London*, 1 Atk. 620, per Lord Hardwicke; *Walton v. Walton*, 14 Ves. 322, per Sir W. Grant; *Starkey v. Brooks*, 1 P. W. 391, per Lord Cowper; *King v. Denison*, 1 V. & B. 279, per Lord Eldon.

(g) *Lloyd v. Spillet*, cited *Cook v. Duckenfield*, 2 Atk. 566; *Lloyd v. Wentworth*, cited *Robinson v. Taylor*, 2 B. C. C. 594; *Smith v. King*, 16 East, 283; *Coningham v. Mellish*, Pr. Ch. 31; *Cook v. Hutchinson*, 1 Keen, 42.

(a) *Rogers v. Rogers*, 3 P. W. 193.

(b) *Buggins v. Yates*, 9 Mod. 122; *Wych v. Packington*, 2 Eq. Ca. Ab. 507; and see *King v. Denison*, 1 V. & B. 274.

14. **Heir of settlor not to be excluded from the resulting trust on mere conjecture.** — It must also be observed, that the heir will not be excluded from the resulting trust on bare conjecture (*c*); and there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that no benefit was intended to the heir; for the trust results to the real representative, not on the ground of intention, but because the ancestor has declared no intention (*d*). Thus, a legacy to the heir, will not prevent a trust from resulting (*e*); but, joined to other circumstances in favour of the devisee, it will not be without its effect (*f*).

15. **Parol evidence.** — As the species of trust we are now considering results by *presumption of law*, it may be rebutted as to instruments *inter vivos* by positive evidence by parol, that the settlor's intention was to confer the surplus interest beneficially (*g*). And it seems that in one case parol evidence was read as to the intention of a *testator*, but the decision of the case turned more particularly upon the intention, as collected from the will itself (*h*).

16. **Of trusts resulting from intention expressed.** — Next, a trust results, by operation of law, where the intention not to benefit the grantee, devisee, or legatee, is *expressed* upon the instrument itself, as if the conveyance, devise, or be-

(*c*) *Halliday v. Hudson*, 3 Ves. 211, *per* Lord Loughborough; and see *Kellett v. Kellett*, 3 Dow, 248; *Amphlett v. Parke*, 2 R. & M. 227; *Phillips v. Phillips*, 1 M. & K. 661; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668.

(*d*) See *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Tregonwell v. Sydenham*, 3 Dow, 211; *Lloyd v. Spillet*, 2 Atk. 151; *Habergham v. Vincent*, 2 Ves. jun. 225.

(*e*) *Randall v. Bookey*, 2 Vern. 425; S. C. Pr. Ch. 162; *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Starkey v. Brooks*, 1 P. W. 390, overruling *North v. Crompton*, 1 Ch. Ca. 196; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668.

(*f*) *Rogers v. Rogers*, 3 P. W. 193; S. C. Sel. Ch. Ca. 81; and see

Docksey v. Docksey, 2 Eq. Ca. Ab. 506; *King v. Denison*, 1 V. & B. 274; *Amphlett v. Parke*, 2 R. & M. 230; *Mallabar v. Mallabar*, Cas. t. Talb. 78.

(*g*) *Cook v. Hutchinson*, 1 Keen, 50, *per* Lord Langdale; *Fowkes v. Pascoe*, 10 L. R. Ch. App. 343; and see *Nicholson v. Mulligan*, 3 I. R. Eq. 308.

(*h*) *Docksey v. Docksey*, 2 Eq. Ca. Ab. 506; and see *North v. Crompton*, 1 Ch. Ca. 196; S. C. cited 2 Vern. 253; *Mallabar v. Mallabar*, Cas. t. Talbot, 78. See also the analogous case of an executor rebutting by parol evidence the presumption arising from the will of a testator's intention to exclude him from the beneficial enjoyment of the residue, *ante*, p. 60.

[*148] quest, be to a *person "upon trust," and no trust declared (a), or the bequest be to a person named as executor "to enable him to carry into effect the trusts of the will," and no trust is declared (b), or the grant, devise, or bequest be upon certain trusts that are too vague to be executed (c), or upon trusts to be thereafter declared, and no declaration is ever made (d), or upon trusts that are void for unlawfulness (e), [or uncertainty (f),] or that fail by lapse (g), &c.; for in these and the like cases the trustee can have

(a) *Dawson v. Clarke*, 18 Ves. 254, per Lord Eldon; *Southouse v. Bate*, 2 V. & B. 396; *Morice v. Bishop of Durham*, 10 Ves. 537; *Woollett v. Harris*, 5 Mad. 452; *Pratt v. Sladden*, 14 Ves. 198; *Dunnage v. White*, 1 Jac. & Walk. 583; *Goodere v. Lloyd*, 3 Sim. 538; *Anon. Case*, 1 Com. 345; *Penfold v. Bouch*, 4 Hare, 271; *Corporation of Gloucester v. Wood*, 3 Hare, 131; 1 H. Lds. Cas. 272; *Attorney-General v. Dean and Canons of Windsor*, 24 Beav. 679; *S. C. in D. P. 8 H. Lds. Cas.* 369; *Welford v. Stokoe*, W. N. 1867, p. 208; *Aston v. Wood*, 6 L. R. Eq. 419; *Candy v. Candy*, W. N. 1872, p. 168; *Yeap Cheah Neo v. Ong Cheng Neo*, 6 L. R. P. C. 381.

(b) *Barrs v. Fewke*, 2 H. & M. 60.

(c) *Fowler v. Garlike*, 1 R. & M. 232; *Morice v. Bishop of Durham*, 9 Ves. 399; *S. C.* 10 Ves. 522; *Stubbs v. Sargon*, 2 Keen, 255; *S. C.* 3 M. & C. 507; *Kendall v. Granger*, 5 Beav. 300; *Leslie v. Devonshire*, 2 B. C. C. 187; *Vezev v. Jamson*, 1 Sim. & Stu. 69; and see *Ellis v. Selby*, 7 Sim. 352; *S. C.* 1 M. & C. 286; *Williams v. Kershaw*, 5 Cl. & Fin. 111; [*Copinger v. Crehane*, 11 I. R. Eq. 429; *Re Jarman's Estate*, 8 Ch. D. 584.]

(d) *Emblyn v. Freeman*, Pr. Ch. 541; *City of London v. Garway*, 2 Vern. 571; *Collins v. Wakeman*, 2 Ves. Jun. 683; *Fitch v. Weber*, 6 Hare, 145; and see *Brown v. Jones*, 1 Atk. 188; *Sidney v. Shelley*, 19 Ves. 352; *Brookman v. Hales*, 2 V.

& B. 45; *Biddulph v. Williams*, 1 Ch. D. 203.

(e) *Carrick v. Errington*, 2 P. W. 361; *Arnold v. Chapman*, 1 Ves. 108; *Tregonwell v. Sydenham*, 3 Dow, 194; *Jones v. Mitchell*, 1 S. & S. 290; *Gibbs v. Rumsey*, 2 V. & B. 294; *Page v. Leapingwell*, 18 Ves. 463; *Pilkington v. Boughey*, 12 Sim. 114; *Morris v. Owen*, W. N. 1875, p. 134; and see *Cooke v. The Stationer's Company*, 3 M. & K. 262. If an estate be devised to A. and his heirs, in trust to sell and pay part of the proceeds to persons capable of taking, and other part to a charity, the statute of mortmain does not avoid the whole legal devise, but affects only the interest given to the charity; *Young v. Grove*, 4 Com. B. Re. 668; *Doe v. Harris*, 16 Mees. & W. 517. [The interest of a partner in the partnership property, so far as it arises from the proceeds of real estate belonging to the partnership, is within the statute of mortmain, *Ashworth v. Munn*, 15 Ch. D. 363.]

[(f) *Scott v. Brownrigg*, 9 L. R. Ir. 246, where a trust for "missionary purposes" was held too vague to be enforced.]

(g) *Ackroyd v. Smithson*, 1 B. C. C. 503; *Spink v. Lewis*, 3 B. C. C. 355; *Williams v. Coade*, 10 Ves. 500; *Digby v. Legard*, cited *Cruse v. Barley*, 3 P. W. 22, note by Cox (1); *Hutcheson v. Hammond*, 3 B. C. C. 128; *Davenport v. Coltman*, 12 Sim. 610; *Muckleston v. Brown*, 6 Ves. 63.

no pretence for claiming the beneficial ownership, when, by the express language of the instrument, the whole property has been impressed with a trust.

17. **"Trust" and "trustee," do not necessarily exclude a beneficial gift.** — Although the introduction of the words "upon trust" may be strong evidence of the intention not to confer on the devisee a beneficial interest (*h*), yet that construction may be negatived by the context, or the general scope of the instrument (*i*); and in *like manner [*149] the devisee may be designated as "trustee," but the expression may be explained away; as, for instance, if the term be used with reference to one only of two funds, the devisee may still establish his title to the beneficial interest in the other (*a*). On the other hand there may be a total *absence* of the word "trust" or "trustee" throughout the whole will, and yet the Court may collect an intention that the devisee or legatee should be a trustee, as where there is a direction that the devisee shall be allowed all his costs and expenses, which would be without meaning if he took beneficially (*b*).

18. **Parol evidence.** — Where a trust results to the settlor or his representative, not by presumption of law, but by force of the written instrument, the trustee is not at liberty to defeat the resulting trust by the production of extrinsic evidence by parol (*c*).

19. **General observations as to resulting trusts.** — Having distinguished between the two kinds of resulting trusts (a classification necessary to be made for the purpose of ascertaining the admissibility of parol evidence), we proceed to introduce a few remarks applicable to resulting trusts generally, whether arising by presumption of law, or from the language of the instrument.

(*h*) See *Hill v. Bishop of London*, 1 Atk. 620; *Woollett v. Harris*, 5 Mad. 452.

(*i*) *Dawson v. Clarke*, 15 Ves. 409; S. C. 18 Ves. 247, see 257; *Coningham v. Mellish*, Pr. Ch. 31; *Cook v. Hutchinson*, 1 Keen, 42; *Hughes v. Evans*, 13 Sim. 496.

(*a*) *Batteley v. Windle*, 2 B. C. C.

31; *Pratt v. Sladden*, 14 Ves. 193; and see *Gibbs v. Rumsay*, 2 V. & B. 294.

(*b*) *Saltmarsh v. Barrett*, 29 Beav. 474; 3 De G. F. & J. 279.

(*c*) See *Langham v. Sanford*, 17 Ves. 442; S. C. 19 Ves. 643; *Rachfield v. Careless*, 2 P. W. 158; *Gladding v. Yapp*, 5 Mad. 59; *White v.*

In trusts for sale, the undisposed of proceeds result to the heir, not the executor. — *First*. If real estate be devised upon trust to sell for a particular purpose, and that purpose either wholly fails or does not exhaust the proceeds, the part that remains unapplied, whether the estate has been actually sold or not, will result to the testator's heir, and not to his next of kin (*d*), and if the testator was seised of the [*150] * estate *ex parte materna*, the undisposed of interest will result to the maternal heir (*a*). And the whole or surplus will result in this manner, though the proceeds of the realty be blended with personal estate in the formation of one common fund (*b*).

The conversion is only for the purposes of the will. — And even an express declaration that the proceeds of the sale shall be considered as part of the testator's *personal estate* will not prevent the operation of the rule (*c*); for a direction of this kind is construed to extend to the purposes of

Evans, 4 Ves. 21; Walton v. Walton, 14 Ves. 322; Irvine v. Sullivan, 8 L. R. Eq. 673.

(*d*) Starkey v. Brooks, 1 P. W. 390; Randall v. Bookey, Pr. Ch. 162; Stonehouse v. Evelyn, 3 P. W. 252; Robinson v. Taylor, 2 B. C. C. 589; Cruse v. Barley, 3 P. W. 20; Buggins v. Yates, 2 Eq. Ca. Ab. 508; Hill v. Cock, 1 V. & B. 173; City of London v. Garway, 2 Vern. 571; Nicholls v. Crisp, cited Croft v. Slee, 4 Ves. 65; Whitehead v. Bennett, 1 Eq. Rep. 560; Digby v. Legard, 2 Dick. 500; Spink v. Lewis, 3 B. C. C. 355; Chitty v. Parker, 4 B. C. C. 411; Collins v. Wakeman, 2 Ves. jun. 683; Howse v. Chapman, 4 Ves. 542; Williams v. Coade, 10 Ves. 500; Berry v. Usher, 11 Ves. 87; Gibbs v. Rumsey, 2 Ves. & B. 294; Maugham v. Mason, 1 V. & B. 410; Wilson v. Major, 11 Ves. 205; Wright v. Wright, 16 Ves. 188; Hooper v. Goodwin, 18 Ves. 156; Jones v. Mitchell, 1 S. & S. 290; Page v. Leapingwell, 18 Ves. 463; Gibbs v. Ougier, 12 Ves. 416; M'Clelland v. Shaw, 2 Sch. & Lef. 545; Mogg v. Hodges, 2 Ves. 52; Eyre v. Marsden,

2 Keen, 564; *Ex parte* Pring, 4 Y. & C. 507; Watson v. Hayes, 5 M. & Cr. 125; Davenport v. Coltman, 12 Sim. 610; Runnett v. Foster, 7 Beav. 540; Marriott v. Turner, 20 Beav. 557; Smith v. Harding, W. N. 1874, p. 101; Watson v. Arundel, 10 I. R. Eq. 299; &c. Note, Countess of Bristol v. Hungerford, 2 Vern. 645, is misreported — see Rogers v. Rogers, 3 P. W. 194, note (C).

(*a*) Hutcheson v. Hammond, 3 B. C. C. 128.

(*b*) Ackroyd v. Smithson, 1 B. C. C. 503; Jessopp v. Watson, 1 M. & K. 665; Salt v. Chattaway, 3 Beav. 576.

(*c*) Collins v. Wakeman, 2 Ves. jun. 683; and see Amphlett v. Parke, 2 R. & M. 226; Field v. Peckett (No. 1), 29 Beav. 568. Ogle v. Cook, cited in Fletcher v. Ashburner, 1 B. C. C. 502, and in Ackroyd v. Smithson, id. 513, was for a long time considered *contra*; but in Collins v. Wakeman, 2 Ves. jun. 686, Lord Loughborough had the Reg. Lib. searched, and it was found the point had been left undecided.

the *will* only, and not to give a right to those who claim, as the next of kin, by *operation of law*. The case of *Phillips v. Phillips* (*d*), before Sir J. Leach, to the contrary, has repeatedly received the disapprobation of the Court (*e*), and has now been overruled (*f*).

Direction for sale, and that the proceeds shall be personal estate.—If a testator direct the proceeds of the sale to be taken as personal estate, and *nothing more is said*, then, as every part of the will ought, if possible, to have an operation, the meaning of the testator might be thought to be, that the realty should be converted into personalty for the benefit of the next of kin by implication; and in *The Countess of Bristol v. Hungerford* (*g*), where the testator directed the proceeds of the sale to be taken as personal estate, and go to his executors, to whom he gave 20*l.* a-piece, it is said the next of kin were declared entitled. The two *next of kin*, however, were also the *co-heirs*, and therefore as *utraq̃ue viâ datâ* the same persons would claim, it was obviously unnecessary to determine the question.

Fitch v. Weber.—And in a late case where the testator even said, “nothing shall result to the heir-at-law,” it was held that nevertheless a bequest to the next of kin was not implied, but that the heir-at-law must take in spite of the intention to the contrary (*h*).

Whether the interest results as real or personal estate.—If the execution of the trust require the estate to be sold, but the purposes of the trust do not exhaust the proceeds, the part that * is undisposed of will result to [*151] the heir in the character of personalty, and, though the sale was not actually effected in his lifetime, will devolve on his executor (*a*); and in the case of a trust created by a

(*d*) 1 M. & K. 649.

(*e*) See *Fitch v. Weber*, 6 Hare, 145; *Shallcross v. Wright*, 12 Beav. 505; *Flint v. Warren*, 16 Sim. 124.

(*f*) *Taylor v. Taylor*, 3 De G. M. & G. 190; S. C. 1 Eq. Rep. 239; *Robinson v. London Hospital*, 10 Hare, 19.

(*g*) Pr. Ch. 81; S. C. 2 Vern. 645; corrected from Reg. Lib. in *Rogers v. Rogers*, 3 P. W. 194, note (C); and

see Sir W. Basset's case, cited Bayley v. Powell, 2 Vern. 361.

(*h*) *Fitch v. Weber*, 6 Hare, 145; and compare *Johnson v. Johnson*, 4 Beav. 318.

(*a*) *Hewitt v. Wright*, 1 B. C. C. 86; *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Mad. 484; *Dixon v. Dawson*, 2 S. & S. 327; *Jessopp v. Watson*, 1 M. & K. 665; *Hatfield v.*

settlor in his lifetime, the undisposed of interest in the proceeds of sale will result to the settlor as personal estate, and go to his personal representative, even though the trust for sale was not to arise until after the settlor's decease (*b*). If however the trusts declared by the testator so entirely fail as not to call for a conversion, then the whole estate will result to the heir as realty, and descend upon his heir (*c*), though the estate may by mistake of the trustees have been actually sold (*d*), and if the testator was seised *ex parte maternâ*, the equitable interest will descend to the testator's heir in the maternal line (*e*).

Sale by Court. — If real estate be devised to A. subject to a charge of debts, and it is sold by the Court, the surplus money, it seems, will not be considered personal estate, so as to devolve on the devisee's *personal representative*, but will descend to his *heir* (*f*); [and the same rule applies to the surplus arising from the sale of mortgaged property under an order made in a foreclosure action (*g*).]

But in a sale of an infant's estate under an order of the Court, which finds that the sale would be for his benefit, the conversion is absolute, and the proceeds are personalty (*h*).

Under Partition Act. — In the sale of the property of an infant (*i*), [or lunatic (*j*).] under the Partition Act, 1868, which incorporates some of the provisions of the Leases and Sales of Settled Estates' Act, the interest of the infant [or

Pryme, 2 Coll. 204; Bagster v. Fackereel, 26 Beav. 469; Wilson v. Coles, 28 Beav. 215; Hamilton v. Foot, 6 L. R. Eq. 572; The Attorney-General v. Lomas, 9 L. R. Ex. 29.

(*b*) Clarke v. Franklin, 4 K. & J. 257.

(*c*) Smith v. Claxton, *ubi supra* (where the doctrines of the court are clearly stated); Bagster v. Fackereel, 26 Beav. 469; Chitty v. Parker, 2 Ves. jun. 213; Buchanan v. Harrison, 1 J. & H. 662.

(*d*) Davenport v. Coltman, 12 Sim. 610.

(*e*) Wood v. Skelton, 6 Sim. 176; see Buchanan v. Harrison, 1 J. & H. 673.

(*f*) Cooke v. Dealy, 22 Beav. 196; [Scott v. Scott, 9 L. R. Ir. 367;] but see Flanagan v. Flanagan, cited Fletcher v. Ashburner, 1 B. C. C. 500; and *Re Cross's Estate*, 1 Sim. N. S. 260; and see Crowther v. Bradney, 28 L. T. N. S. 464.

[(*g*) Scott v. Scott, 9 L. R. Ir. 367; Jermy v. Preston, 13 Sim. 356; Richardson v. Nixon, 2 J. & L. 250, 259.]

(*h*) Steed v. Preece, 18 L. R. Eq. 192; and see Batteste v. Maunsell, 10 L. R. Eq. 97, 314.

(*i*) Foster v. Foster, 1 Ch. D. 588; but see Arnold v. Dixon, 19 L. R. Eq. 113.

[(*j*) *Re Barker*, 17 Ch. D. 241;

lunatic] retains its character of real estate [and on his death intestate descends to his heir-at-law, but the heir will take *it as realty or personalty according to its actual state of investment (a). [*152]

So, where in a partition suit a sale was directed of certain real estate, one-eighth of which belonged to a married woman in fee, and an order was subsequently made directing that the husband and wife accepting a certain sum as the purchase-money of the one-eighth, that sum shall be paid into Court, which was accordingly done, but before any conveyance was executed the married woman died, it was held that the purchase-money must be treated as realty (b). But since the Partition Act, 1876, if an order be made for the sale of a married woman's share in real estate, with her consent or at her request, it will operate as a conversion (c). Where a sale was ordered in a partition action and the share of a person who was *sui juris* was ordered to be paid to her, but before payment she became a lunatic and afterwards died intestate, it was held that conversion of the share had taken place at the date of the sale.¹

[Where discretion in trustees.—If trustees have a discretionary power of sale, and an order is made in an administration action directing a sale, the property is converted into personalty as from the date of the order (d).]

Under Lands Clauses Consolidation Act.—If land of which an infant is seised in fee simple be taken under the provisions of the Lands Clauses Consolidation Act, 1845, and the purchase-money be paid into Court, the money retains the quality of real estate, and on the death of the infant descends to his heir-at-law (e).]

Secondly. Money to be laid out on land results to the executor.—If a testator bequeath money to be laid out in a

Grimwood v. Bartels, 46 L. J. N. S. Ch. 788.]

[(a) Mordaunt v. Benwell, 19 Ch. D. 302.]

[(b) Mildmay v. Quicke, 6 Ch. D. 553.]

[(c) Wallace v. Greenwood, 16 Ch. D. 362.]

[(d) Hyett v. Mekin, 25 Ch. D. 785; Crowther v. Bradney, 28 L. T. N. S. 464.]

[(e) Kelland v. Fulford, 6 Ch. D. 491.]

¹ *Re Pickard*, 53 L. T. N. S. 293.

purchase of *land*, to be settled to uses which either wholly or partially fail to take effect, the undisposed of interest in the money, or estate if purchased, will result to the [testator's *next of kin* (*f*); and will belong to them as realty or personalty, according to its nature in the view of a Court of equity at the time it results (*g*).]

The old authorities (*h*) upon the subject are somewhat conflicting; but it will be superfluous to enter upon a particular examination of them, as the case of *Cogan v. Stephens* (*i*), before Lord Cottenham, while at the Rolls, finally decided the point in favour of the next of kin.

[*153] * *Thirdly. Appointed fund results to the donee of the power.*—“Where” (to use the words of Lord St. Leonards) “there is a power to appoint a settled fund, the execution of the power takes the part appointed entirely out of the settlement. Although, therefore, the beneficial interest in the fund is not in terms expressly disposed of, yet there can be no resulting trust for the benefit of any person under the *deed creating the power*, for when the fund is appointed it must be considered as if it had never been comprised in the trust, because it is absolutely taken out of it by the execution of the power” (*a*). If, therefore, a *feme covert* has in certain events which occur a power to appoint a settled fund by will, and she appoints executors and directs them to apply the fund in payment of legacies which do not exhaust it, [or fail,] the executors hold the surplus in trust, not for the persons entitled under the settlement in default of appointment, but as part of the personal estate of the donee of the power (*b*). [And there is no distinction in this respect

(*f*) *Cogan v. Stephens*, 5 L. J. N. S. Ch. 17; *Hereford v. Ravenhill*, 1 Beav. 481; [*Curteis v. Wormald*, 10 Ch. D. 172; but see] *Reynolds v. Godlee*, Johns. 536, see 583.

(*g*) *Curteis v. Wormald*, 10 Ch. D. 172.]

(*h*) *Fletcher v. Chapman*, 3 B. P. C. 1; *Hayford v. Benlows*, Amb. 582; *Leslie v. Duke of Devonshire*, 2 B. C. C. 187; *Browne v. De Laet*, 4 B. C.

C. 534; *Tregonville v. Sydenham*, 3 Dow, 207; *Abbot v. Lee*, 2 Vern. 284; S. C. Append. No. ii. to 3d Edition; *Mogg v. Hodges*, 2 Ves. 52.

(*i*) Append. No. iii. to 3d Edition; S. C. 5 L. J. N. S. Ch. 17. As to the principle, see the author's argument in favour of the next of kin in the early editions.

(*a*) *Treat. of Powers*, 8th Ed. p. 467.

(*b*) *Brickenden v. Williams*, 7 L. R.

between the cases of real estate and personal estate; and so realty appointed under a general power to trustees for purposes which fail will result to the appointor and go as part of his realty (c). But where the appointment is made directly to the person intended to be beneficially interested without the interposition of any trustee, on the death of the appointee in the lifetime of the donee of the power the appointment wholly fails, and the appointed funds will revert to the persons entitled in default of appointment (d).]

Fourthly. In a gift of the whole, subject to a charge that may not arise, no trust results.—It often happens, that the settlor makes a primary disposition of the *whole* property to A. subject to a particular charge in favour of B., and the charge in event either wholly or partially fails so as either not to divest, or only *pro tanto* to divest the estate of A. The reader must distinguish the preceding cases of resulting trust from such a gift as this; for here, as the entirety is disposed of in the first instance to A., so far as the charge does not exhaust it, there can nothing result to the heir, even should the charge not take effect. The distinction was thus stated by Sir J. Leach:—*“If the devise,” he said, [*154] “to a particular person, or for a particular purpose, be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure” (a).

Eq. 310; [Wilkinson v. Schneider, 9 L. R. Eq. 423; *Re Pinède's Settlement*, 12 Ch. D. 667; *Re Ickeringill's Estate*, 17 Ch. D. 151; *Rous v. Jackson*, 29 Ch. D. 521; *Re Horton*, 51 L. T. N. S. 420.] *Chamberlain v. Hutchinson*, 22 Beav. 444; *Mansell v. Price*, Sug. Powers. Appendix. [“In all cases of this class the question is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the partic-

ular disposition expressed” *per* V. C. I. *Re De Lusi's Trusts*, 3 L. R. Ir. 232, 237, approved by M. R. *Re Pinède's Settlement*, *ubi sup.*; *Re Van Hagan*, 16 Ch. D. 18; *Willoughby Osborne v. Holyoake*, 22 Ch. D. 238.]

[(c) *Re Van Hagan*, 16 Ch. D. 18.]

[(d) *Re Davies' Trusts*, 13 L. R. Eq. 163; *Re De Lusi's Trusts*, 3 L. R. Ir. 232.]

(a) *Cooke v. The Stationers' Company*, 3 M. & K. 264.

Gift charged with a contingent legacy. — Thus, if lands be devised to A. charged with a legacy to B. provided B. attain the age of twenty-one, should B. die without attaining that age, the devise has become absolute in A., and the will is to be read as if the legacy to B. had never been mentioned (*b*). So if the lands be given to A. charged with a legacy to B., and B. dies in the testator's lifetime (*c*).

Gift charged with a sum to be appointed, and the power not exercised. — The construction is the same, if lands be given to A. subject to and charged with any sum not exceeding 10,000*l.* to such persons, and in such manner as the testator shall appoint, and the power is either never exercised, or the execution of it is void (*d*): for here, as the testator confers the whole interest on the devisee, reserving the power, if he either abstain from executing the power, or appoint for an illegal purpose, he does not diminish that interest, but the heir is wholly disinherited (*e*).

Noel v. Lord Henley. — And where a testator had devised certain estates upon trust to sell, and out of the proceeds to pay 5000*l.* unto his wife, her executors and administrators, *in part satisfaction of the sum of 10,000*l.* secured to her by marriage settlement in case of her surviving him*, and to invest the residue upon certain trusts, and the wife died in the lifetime of the husband, so that the 10,000*l.* never became raisable, it was held that the 5000*l.* instead of resulting to the heir was included in the residue (*f*). The construction put upon the will was, that the whole fund was in the first instance given to the residuary legatees, subject to a charge of 5000*l.* to arise on a certain event, and that contingency having never occurred, the primary devise of the entirety was never divested (*g*).

(*b*) Tregonwell v. Sydenham, 3 Dow, 210, *per* Lord Eldon. Sprigg v. Sprigg, 2 Vern. 394, was decided on this principle; Cruse v. Barley, 3 P. W. 20, should have been decided the same way, but the point was not noticed. See Attorney-General v. Milner, 3 Atk. 112; Croft v. Slee, 4 Ves. 60.

(*c*) Sutcliffe v. Cole, 3 Drew. 185.

(*d*) Jackson v. Hurlock, 2 Eden, 263; Cooke v. The Stationers' Company, 3 M. & K. 262; Tucker v. Kayes, 4 K. & J. 339.

(*e*) Tregonwell v. Sydenham, 3 Dow, 213, *per* Lord Eldon.

(*f*) Noel v. Lord Henley, 7 Price, 241; S. C. Dan. 211, and 322.

(*g*) That the case was probably decided on this ground, see observations

Gift of a charge, and "subject thereto" to A.—Again, if an estate be settled to the use of trustees for a term of *ninety-nine years, upon trusts that [*155] do not exhaust the whole interest, and from and after the expiration, or other sooner determination of the said term, and *subject thereto*, to uses in strict settlement, the surplus of the term will be in trust, not for the heir, but for the devisees in remainder, for here the intention is express, that subject to trusts which have been exhausted, the remaindermen shall take the whole estate (a). So where an estate was devised to trustees upon trust within one year after the testator's decease to raise 2000*l.* and "after raising the same" upon trusts in strict settlement, the Court held the 2000*l.* to be a charge upon and not an exception out of the estate (b).

"Subject thereto" implied.—And if the limitation be to trustees for ninety-nine years upon the trusts thereafter expressed, and the instrument makes no mention of the trusts, and from and after the expiration, or other sooner determination of the said term to uses in strict settlement, the Court will consider the intention to be clearly *implied*, that the remaindermen should have the beneficial enjoyment subject to the term, and will read the will, as if the words *subject thereto and to the trusts thereof* had been actually expressed (c).

[Charge if actually raised reverts as personal estate.—If the amount charged be actually raised, and subsequently the trusts effecting it fail, so that it reverts to the devisee of the estate subject to the charge, the devisee will take it as *personal estate*, for there is no purpose requiring that it should be turned into land again, and no equity in any person to have it laid out in land (d).]

of Richards, C. B. Dan. 235, and of Lord Eldon, ib. 338.

(a) Davidson v. Foley, 2 B. C. C. 203; Marshall v. Holloway, 2 Swans. 432; Lord Southampton v. Marquis of Hertford, 2 V. & B. 54; and see Maundrell v. Maundrell, 10 Ves. 259; [Re Newberry's Trusts, 5 Ch. D. 746.]

(b) Re Cooper's Trusts, 4 De G. M. & G. 757; S. C. 2 Eq. Rep. 65.

(c) Sidney v. Shelley, 19 Ves. 352; S. C. nom. Sidney v. Miller, G. Coop. 206; overruling the dictum of Lord Hardwicke, in Brown v. Jones, 1 Atk. 191.

[(d) Re Newberry's Trusts, 5 Ch. D. 746.]

Charity legacies. — There has been much discussion in the Courts how far the rule establishing a distinction between a *charge upon* and *exception from* a devise is applicable to a charity legacy. The question is one of difficulty, and before stating the apparent result of the cases, it may be useful to premise a few words as to the principle.

Difference between exception from a devise, and charge upon a devise. — If a testator had, before the late Wills Act, devised an estate, worth 10,000*l.*, to trustees in trust to sell, and out of the proceeds to pay 1000*l.* to A., and had given all the residue of his real estate to B., and A. had died in the testator's lifetime, the lapse would have enured to the benefit not of the devisee, but of the heir-at-law; the reason was, that in real estate the word "residue" had not the same meaning as in personal estate, but each devise was [*156] *considered a specific one, and the 1000*l.* and the 9000*l.* were distinct fractions of the estate, so that if either failed in event, the undisposed of interest resulted to the heir-at-law. If, however, a testator had devised an estate to A. and his heirs *charged* with a legacy of 1000*l.* to B., and B. had died in the testator's lifetime, then A. would have taken the estate free from the legacy: not that the devisee was intended to take the legacy, *quâ* legacy, but the testator had constituted a *hæres factus* to the disinherison at all events of the heir-at-law, and as the legacy was given not directly to the legatee, in which case it would be an exception from the devise of the estate, but had been made a charge to be raised, so far as might be necessary, out of the estate previously devised, the legacy, as in the event it was not required to be raised, sunk for the benefit of the devisee.

Possible distinction in the case of a legacy to a charity. — Now in a devise to A. and his heirs charged with a legacy to a charity, on the one hand it may be said that in the case of an *ordinary* charge the lapse of the legacy is an incident to the bequest, which the testator may be taken to have contemplated, and he may have meant that on the occurrence of that event the devisee should be entitled; but in the instance of a *charity*, the object of the legacy *exists* at the testator's death, and the event on which the money was payable has

arisen; he could not, therefore, have intended the devisee to take the legacy, which is bequeathed under the very circumstances to the charity; the legacy therefore in this case, though in form a charge, is in fact an exception. On the other hand it may be argued that where the legacy is admitted to be a charge and not an exception, the devisee does not take the legacy *because the legacy was intended for him*, since then in the case of a *lapse* the charge would not have sunk for the benefit of the devisee; for in real estate, until the late Wills Act, that only went to the devisee which was not otherwise *expressed* to be disposed of whether the bequest took effect or not, as in the case above noticed of a trust for sale, where the lapse of a legacy out of the proceeds enured to the benefit of the heir, but, nevertheless, in a charge the devisee did take the legacy in case of a lapse, *from the form in which the legacy was given*; a result which shows the true view*to be that the testator first constituted the devisee the *haeres factus* of the whole estate, which disinherited the heir, and then as the legacy was made a graft upon that estate, and the legacy failed, the estate was exonerated from the burden. Lord Alvanley was of opinion that this was the right ground, and that it mattered not in what way the failure of the legacy arose, whether *by lapse, or the unlawful- [*157] ness of the object: "It is now perfectly settled," said Lord Alvanley, "that if an estate is devised, charged with legacies, and the legacies fail, *no matter how*, the devisee shall have the benefit of it and take the estate" (a).

Results of the cases. — The cases upon the subject are very conflicting, but the best results that can be obtained from them appear to be these:

(1.) The first inquiry to be made is, whether upon the whole will the testator intended the legacy and the devise to be two distinct independent gifts, flowing directly from himself to the legatee and devisee, or whether he devised the whole estate in the first instance to the devisee to the disinherison of the heir, and then gave the legacy, not as an original gift from the testator to the legatee, but by way of graft upon

(a) *Kennell v. Abbott*, 4 Ves. 811; L. R. Eq. 521; *Dawson v. Small*, 18 [and see *Fisk v. Attorney-General*, 4 L. R. Eq. 114.]

the estate previously given to the devisee; in the former case the legacy would be an exception (*b*), and in the latter a charge.

(II.) Assuming the legacy to be, according to the true construction of the will, not an exception but a charge, then if the legacy be given by way of a *condition* imposed on the devisee, the legacy, as the condition is void, sinks for the devisee's benefit (*c*).

(III.) If the estate be devised charged with a sum, say of 1000*l.*, to be paid to the testator's executors and applied in discharge of his debts and legacies, including a legacy to a charity, in this case the charge is raisable as against the devisee, and the charity legacy will be a resulting trust to the testator's heir-at-law (*d*).

(IV.) If the estate be simply devised to one, charged with or subject to a legacy in favour of another, and there is nothing on the face of the will to show that the legacy though expressed in the form of a charge, was meant to be an exception, then the leaning of the Court at the present day would appear to be in favour of the devisee (*e*).

[*158] * (*v*.) It may be doubted whether the circumstance of a direction for an intermediate payment to the testator's executors of the sum to be raised be a tenable ground of distinction, and should the Court decide in favour of a devisee in a case under the fourth head, such decision would undoubtedly shake those in favour of the heir under the third. It would be a reasonable and intelligible rule to

(*b*) *Cooper's Trusts*, 4 De G. M. & G. 757. See *Tucker v. Kayess*, 4 K. & J. 339.

(*c*) *Poor v. Mial*, 6 Madd. 32; *Arnold v. Chapman*, 1 Ves. 108; *Ridgway v. Woodhouse*, 7 Beav. 437. See *contra* *Bland v. Wilkins*, cited *Wright v. Row*, 1 B. C. C. 61 note. In *Cooke v. Stationers' Company*, the M. R. said the condition made no difference, as it was no more than a charge, 3 M. & K. 266.

(*d*) *Arnold v. Chapman*, 1 Ves. 108; *Henchman v. Attorney-General*, 3 M. & K. 404.

(*e*) *Cooke v. Stationers' Company*, 3 M. & K. 262; *Baker v. Hall*, 12 Ves.

497 (but the heir was not a party); *Barrington v. Hereford*, cited *Wright v. Row*, 1 B. C. C. 61; *Jackson v. Hurlock*, 2 Eden, 263; Amb. 487; and see remarks of Lord Redesdale and Lord Eldon on this case in *Tregonwell v. Sydenham*, 3 Dow, 208-213. Lord Eldon assumed the power to be good, but that, as it was exercised in favour of a charity, the devisee was not affected by a void execution of the power, and was rightly allowed to retain the estate; in fact, there was no appointment to a charity, for the letter, not being of a testamentary character, could not be read. See *contra* *Gravenor v. Hallum*, Amb. 643.

lay down that where the failure of the legacy arises from any event which the testator might reasonably have contemplated, as, the death of the legatee in his lifetime, then the legacy should sink for the benefit of the devisee: but that where the legacy is raisable in the event which has happened, and the legacy is only not paid because the policy of the law, in spite of the intention, forbids it, as in the case of a legacy to a charity, there the legacy was in fact never given to the devise, and a trust should result for the benefit of the heir. The subject, as the matter now stands, is in a very unsatisfactory state.

Fifthly. The interest that would have resulted may be disposed of by will. — It has been stated in general terms, that, in the cases we have mentioned, a trust will result to the settlor or his real or personal representative, but the doctrine must be received with at least this qualification, that the interest which would have resulted is not otherwise disposed of by the settlor himself.

Any interest that would have resulted may of course be given away from the settlor's representative, by a *particular* and *specific* devise or bequest; it remains only to inquire what is the effect of certain *general* expressions.

Construction of the word "residue" in real estate. — With respect to a testator's realty, the heir "shall sit in the seat of his ancestor," unless the disinheriton be expressed or clearly implied. The word "residue," therefore, had, before the late Wills Act, received in devises a strict and narrow construction, and was held to mean, not all that the testator had not actually disposed of, but only so much of which he had shown no intention of disposing. Thus, if lands had been devised upon trust to raise 5000*l.* for a charity, the residue to A. (a), or upon trust to raise 5000*l.* for a charity, with a general devise "of all the residue of the testator's real estate, whatsoever and wheresoever" (b), in either

(a) *Hutcheson v. Hammond*, 3 B. C. C. 128; *Page v. Leapingwell*, 18 Ves. 463; *Collins v. Wakeman*, 2 Ves. jun. 683; *Cruse v. Barley*, 3 P. W. 20; *Jones v. Mitchell*, 1 S. & S. 293; *Sprigg v. Sprigg*, 2 Vern. 394, *per*

Cur.; *Cooke v. Stationers' Company*, 3 M. & K. 264, *per Cur.*; *Anon. case*, 1 Com. 345.

(b) *Goodright v. Opie*, 8 Mod. 123; *Wright v. Hall*, Fort. 182; S. C. 8 Mod. 222; *Roe v. Fludd*, Fort. 184;

[*159] case the void legacy would have resulted to *the heir, and not have been included in the residuary clause. Now, by the late Wills Act, a residuary devise, unless a contrary intention appear by the will, is made to sweep every interest undisposed of in real estate, as a residuary bequest already did in respect of personal estate (*a*).

Construction of "personal estate" as applicable to proceeds from sale of real estate.—If a testator direct his lands to be sold, and afterwards add a general bequest of all his *personal estate* (*b*), or appoint a person *residuary executor* (*c*), any part of the proceeds of the sale that is undisposed of will not form part of the residuary fund in the first case, or pass to the residuary executor in the second; for nothing, properly speaking, is a testator's "*personal estate*," but what possesses that character at the moment of his decease (*d*).

"Personal estate" in certain cases may pass such proceeds.—But the intention of converting the property absolutely by the sale, so as to make the proceeds undisposed of by the will pass by the description of the testator's "*personal estate*," may be collected from a will specially worded (*e*); and the blending of the real and personal estate into one fund will be regarded as a circumstance in some degree indicative of such an intention (*f*), and this of course will be the case, where the testator expressly directs the proceeds to be considered as part of his personalty (*g*).

Watson v. Earl of Lincoln, Amb. 325; *Oke v. Heath*, 1 Ves. 141, *per* Lord Hardwicke; *Cambridge v. Rous*, 8 Ves. 25, *per* Sir W. Grant; *Doe v. Underdown*, Willes, 293. But see *Page v. Leapingwell*, 18 Ves. 463; but it does not appear that the heir was a party, and the question was not discussed.

(*a*) 1 Vict. c. 26, s. 25.

(*b*) *Maugham v. Mason*, 1 V. & B. 410; *Smith v. Harding*, W. N. 1874, p. 101; and see *Gibbs v. Rumsey*, 2 V. & B. 294.

(*c*) *Berry v. Usher*, 11 Ves. 87.

(*d*) See *Maugham v. Mason*, 1 V. & B. 416.

(*e*) *Mallabar v. Mallabar*, Cas. t.

Talb. 78; *Brown v. Bigg*, 7 Ves. 279; *Court v. Buckland*, 1 Ch. D. 605; *Durour v. Motteux*, 1 Ves. 321. (See *Motteux's* will correctly stated, *Jones v. Mitchell*, 1 S. & S. 292, note (*d*). See *Observations on Mallabar v. Mallabar*, and *Durour v. Motteux*, in *Maugham v. Mason*, 1 V. & B. 416.)

(*f*) Compare *Durour v. Motteux*, 1 Ves. 321, with *Maugham v. Mason*, 1 V. & B. 417; *Hutcheson v. Hammond*, 3 B. C. C. 148, *per* Lord Thurlow; but see *Berry v. Usher*, 11 Ves. 87.

(*g*) *Kidney v. Coussmaker*, 1 Ves. jun. 436; and see *Field v. Peckett*, (No. 1), 29 Beav. 568, and *Lowes v. Hackward*, 18 Ves. 171. In *Collins*

Whether a gift of residuary personal estate will pass lapsed legacies from proceeds of sale of real estate.—The question was much discussed before the late Wills Act, and may still be material, what expressions of a testator will amount to such an absolute conversion of real estate into personal, that a *void or lapsed legacy* given out of the proceeds of the sale shall, as if the property had been personal, fall into the residuary bequest, instead of resulting to the heir. “I agree,” said Lord Brougham, “a testator may provide that lapsed and void legacies *shall go in this man- [*160] ner, as if the testator say in express words, ‘I give all lapsed and void legacies as parcel of my residue to the residuary legatee,’ and if he can do it by express words, he can do it by plain and obvious intention to be gathered from the whole instrument” (a). But what will amount to such an implication is a point that can with difficulty be brought under any very definite rule.

Results of the authorities.—Apparently the only principle to be extracted from the authorities is, that a lapsed or void legacy will pass to the residuary legatee, *if the testator expressly declare that the proceeds of the sale shall be considered as “personal estate,” or if the intention of an absolute conversion into personal estate for all the purposes of the will can, without the aid of any such express declaration, be gathered from the general structure of the will* (b).

Next of kin and residuary legatee distinguished.—It was stated in a former page, that if a testator direct the proceeds of the sale to be taken as “*personal estate*,” a part of the proceeds undisposed of by him will nevertheless not result to the *next of kin*. The distinction between the *next of kin* and the *residuary legatee* is this: the former claim *dehors* the will, while the latter is a claimant *under* the will, and when the

v. Wakeman, 2 Ves. jun. 683, the sum undisposed of did not fall into the residue on the principles adopted in *Davers v. Dewes*, 3 P. W. 40, and *Attorney-General v. Johnstone*, Amb. 577.

(a) *Amphlett v. Parke*, 2 R. & M. 232; and see *McClelland v. Shaw*, 2 Sch. & Lef. 545.

(b) *Durour v. Motteux*, 1 Ves. 321 (see the will stated from Reg. Lib. in *Jones v. Mitchell*, 1 S. & S. 292, note (d)); *Kennell v. Abbott*, 4 Ves. 802; *Amphlett v. Parke*, 1 Sim. 275; S. C. 2 R. & M. 221; *Green v. Jackson*, 5 Russ. 35; S. C. 2 R. & M. 238; *Salt v. Chattaway*, 3 Beav. 576. [And see *Singleton v. Tomlinson*, 3 App.

proceeds of the sale are directed to be taken as personalty, the testator must be understood to mean for the purposes of the will only, and not for any object beyond it.

Resulting trust of personal estate.—With respect to resulting trusts of *personal* estate, the general residuary bequest was always held to sweep every interest, whether undisposed of by the will, or undisposed of in event, and therefore it is only where the will contains no residuary clause that the next of kin can assert a claim to the benefit of the resulting interest (*c*). But if any part of the personal estate be expressly excepted from the residue, as if a testator reserve a sum to be disposed of by a codicil, and give the residue not disposed of or reserved to be disposed of to A., and no codicil is executed, the sum so specially excepted will then result to the next of kin (*d*).

[*161] **Sixthly*. **Case of settlor or deviser dying without heir or next of kin.**—[In the case of the death of a settlor intestate, without heir or next of kin, the undisposed of beneficial interest in real estate, if the death occurred before the 14th August, 1884, sank into the land for the benefit of the trustee or legal tenant (*a*); and where the death occurs since that date, it escheats to the lord as if the interest were a legal estate in corporeal hereditaments (*b*);] but in the case of personalty the resulting interest, as *bonum vacans*, will fall to the Crown by the prerogative (*c*).

Of resulting trusts in gifts to charities.—*Lastly*, it may be noticed that settlements to *charitable* purposes are an exception from the law of resulting trusts: for, upon the construction of instruments of this kind, the Court has adopted the following rules:—

Cas. 404.] As to *Mallabar v. Mallabar*, Cas. t. Talb. 78, see *Phillips v. Phillips*, 1 M. & K. 660.

(*c*) See *Dawson v. Clarke*, 15 Ves. 417; *Brown v. Higgs*, 4 Ves. 708; S. C. 8 Ves. 570; *Shanley v. Baker*, 4 Ves. 732; *Jackson v. Kelly*, 2 Ves. 285; *Oke v. Heath*, 1 Ves. 141; *Cambridge v. Rous*, 8 Ves. 25; *Cooke v. Stationers' Company*, 3 M. & K. 264.

(*d*) *Davers v. Dewes*, 3 P. W. 40;

Attorney-General v. Johnstone, Amb. 577.

(*a*) *Burgess v. Wheate*, 1 Eden, 177; *Henchman v. Attorney-General*, 3 M. & K. 485; *Taylor v. Haygarth*, 14 Sim. 8; *Davall v. New River Company*, 3 De G. & Sm. 394; *Cox v. Parker*, 22 Beav. 168.

[(*b*) 47 & 48 Vict. c. 71, s. 4.]

(*c*) *Middleton v. Spicer*, 1 B. C. C. 201; *Barclay v. Russell*, 3 Ves. 424;

(I.) **Where no object expressed, the Court will direct the application of the estate to some charity.**—Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularises no objects (*d*), or such as do not exhaust the proceeds (*e*), the Court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

(II.) **Where the rents increase, the surplus will be applied to like charitable purposes.**—Where a person settles lands, or the rents and profits of lands to purposes which at the time exhaust the whole proceeds, but, in consequence of an increase in the value of the estate, an excess of income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*f*).

Taylor v. Haygarth, 14 Sim. 8; *Powell v. Merrett*, 1 Sm. & G. 381; *Cradock v. Owen*, 2 Sm. & G. 241; see *ante*, p. 61.

(*d*) *Attorney-General v. Herrick*, Amb. 712.

(*e*) *Attorney-General v. Haberdashers' Company*, 4 B. C. C. 102; S. C. 2 Ves. jun. 1; *Attorney-General v. Minshull*, 4 Ves. 11; *Attorney-General v. Arnold*, Shower's P. C. 22; and see *Attorney-General v. Sparks*, Amb. 201; and Lord Eldon's observations, in *Attorney-General v. Mayor of Bristol*, 2 J. & W. 319. But where a gift is to a particular charity which exists at the date of the will, but is dissolved in the testator's lifetime, it is as much a lapse as a gift to a man who has ceased to exist, *Fisk v. Attorney-General*, 4 L. R. Eq. 521. And where a fund was given to trustees for education in the United States, and the United States repudiated the gift, the fund was not applied to other charitable objects, but fell into the residue, *New v. Bonaker*, 4 L. R. Eq. 655.

(*f*) *Inhabitant of Eltham v. Warreyn*, Duke 67; *Sutton Colefield case*,

second resolution, Id. 68; *Hynshaw v. Morpeth Corporation*, Id. 69; *Thetford School case*, 8 Rep. 130 *b*; *Attorney-General v. Johnson*, Amb. 190; *Kennington Hastings case*, Duke 71; *Attorney-General v. Mayor of Coventry*, 2 Vern. 397, reversed in D. P. 7 B. P. C. 236; (see the foregoing cases commented upon by Lord Eldon in *Attorney-General v. Mayor of Bristol*, 2 J. & W. 316;) *Attorney-General v. Coopers' Company*, 19 Ves. 189, *per* Lord Eldon; *Attorney-General v. Wilson*, 3 M. & K. 362; *Lad v. London City*, Mos. 99; *Attorney-General v. Coopers' Company*, 3 Beav. 29; *Attorney-General v. Master of Catherine Hall*, Cambridge, Jac. 381; *Attorney-General v. Beverley*, 6 H. L. Cas. 310; *Attorney-General v. Drapers' Company*, 2 Beav. 508; 4 Beav. 67; *Attorney-General v. Christ's Hospital*, Ib. 73; *Attorney-General v. Merchants Venturers' Society*, 5 Beav. 338; *Attorney-General v. Corporation of Southmolton*, 14 Beav. 357; *Attorney-General v. Caius College*, 2 Keen, 150; *Attorney-General v. Wax Chan-*

[*162] * (III.) **Exceptions from the foregoing rules.**—But even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir-at-law (*a*), or will belong to the donee of the property subject to the charge, if the donee be (as in the case of a charitable corporation) itself an object of charity (*b*).

The doctrine in favour of charities established before trusts were settled.—The exceptions we have noticed were established at an early period, when the doctrine of resulting trusts was imperfectly understood (*c*). The interest of the heir was shut entirely out of sight, and the question was viewed as between the charity and the trustee (*d*). Were the subject still unprejudiced by authority, there is little doubt but the Court would, at the present day, follow the general principle, and hold a trust to result (*e*).

SECTION II.

OF RESULTING TRUSTS UPON PURCHASES IN THE NAMES OF THIRD PERSONS.

Purchases of this kind are governed by different rules, according to the relation which subsists at the time between

dlers' Company, 6 L. R. H. L. 1; and see *Attorney-General v. Smythies*, 2 R. & M. 717; *Attorney-General v. Drapers' Company*, 6 Beav. 382; *Attorney-General v. Jesus College*, 20 Beav. 163. The additional benefit is not always distributed amongst the different objects of the charity ratably, but the Court exercises a discretion as to the proportions, *Attorney-General v. Marchant*, 3 L. R. Eq. 424.

(*a*) See *Attorney-General v. Mayor of Bristol*, 2 J. & W. 308.

(*b*) *Attorney-General v. Beverley*, 6 H. L. Cas. 310; *Attorney-General v. Southmolton*, 5 H. L. Cas. 1; *Attorney-General v. Trinity College*, 24 Beav. 383; *Attorney-General v. Dean of Windsor*, 24 Beav. 679; affirmed

in D. P. 8 H. L. Cas. 369; *Attorney-General v. Sidney Sussex College*, 4 L. R. Ch. App. 722; *Attorney-General v. Wax Chandlers' Company*, 8 L. R. Eq. 452; 5 L. R. Ch. App. 503; 6 L. R. H. L. 1; and see *Attorney-General v. Mercers' Company*, 22 L. T. N. S. 222, 18 W. R. 448; *Merchant Taylors' Company v. Attorney-General*, 11 L. R. Eq. 35; affirmed, 6 L. R. Ch. App. 512.

(*c*) *Attorney-General v. Johnson*, Amb. 190, per Lord Hardwicke; *Attorney-General v. Mayor of Bristol*, 2 J. & W. 307, per Lord Eldon.

(*d*) See *Thetford School case*, 8 Rep. 130.

(*e*) See *Attorney-General v. Mayor of Bristol*, 2 J. & W. 307.

the person who pays the money, and the person in whose name the conveyance *is taken. We must, [*163] therefore, distribute the subject under two heads:

First, Purchases in the name of a stranger; and Secondly, Purchases in the name of a child, or wife, or near relatives.

First. Where the purchase is in the name of a stranger.

1. **General rule.**—"The clear result," said Lord Chief Baron Eyre, "of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly (*a*), or *successive* (*b*), results to the man who advances the purchase-money (*c*); and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor" (*d*).

2. **Who in particular cases is the real purchaser.**—But no trust will result unless the person advance the money in the character of a *purchaser*; for if A. discharge the purchase-money by way of *loan* to B., in whose name the conveyance is taken, no trust will result in favour of A., who is merely a creditor of B. (*e*). And, on the other hand, should B. advance the purchase-money, but only on account of A.,

(*a*) See *Ex parte Houghton*, 17 Ves. 251; *Rider v. Kidder*, 10 Ves. 367.

(*b*) *Withers v. Withers*, Amb. 151; *Howe v. Howe*, 1 Vern. 415; *Goodright v. Hodges*, 1 Watk. Cop. 227; *S. C. Loftt*, 230; *Smith v. Baker*, 1 Atk. 385; *Clark v. Danvers*, 1 Ch. Ca. 310; *Prankerd v. Prankerd*, 1 S. & S. 1.

(*c*) *Redington v. Redington*, 3 Ridg. 177, per Lord Loughborough; *Hungate v. Hungate*, Tothill, 120; *Ex parte Vernon*, 2 P. W. 549; *Ambrose v. Ambrose*, 1 P. W. 321; *Willis v. Willis*, 2 Atk. 71; *Woodman v. Morrel*, 2 Freem. 33, per Cur.; ib. 123; *Finch v. Finch*, 15 Ves. 50, per Lord Eldon; *Grey v. Grey*, 2 Sw. 597; *S. C. Finch*, 340, per Lord Nottingham; *Wray v.*

Steele, 2 V. & B. 390, per Sir T. Plumer; *Smith v. Camelford*, 2 Ves. jun. 712, per Lord Loughborough; *Anon.* 2 Vent. 361; *Pelly v. Maddin*, 21 Vin. Ab. 498; *Lever v. Andrews*, 7 B. P. C. 288; *Lade v. Lade*, 1 Wils. 21; *Groves v. Groves*, 3 Y. & J. 170, per Ch. Bar. Alexander; *Murless v. Franklin*, 1 Sw. 17, 18, per Lord Eldon; *Crop v. Norton*, 9 Mod. 235; *S. C. Barn.* 184; *S. C. 2 Atk.* 75, per Lord Hardwicke; *Trench v. Harrison*, 17 Sim. 111; *James v. Holmes*, 4 De G. F. & J. 470.

(*d*) *Dyer v. Dyer*, 2 Cox, 93; *S. C.* 1 Watk. Cop. 218.

(*e*) See *Bartlett v. Pickersgill*, 1 Eden, 516; *Crop v. Norton*, 9 Mod. 235.

then A. is the owner in equity, and B., who takes the conveyance, stands in the light of a creditor (*f*).

3. **Principle applicable to personalty.**—Not only *real estate* but *personalty* also is governed by these principles, as if a man take a bond (*g*), or purchase an annuity (*h*), stock (*i*), or other chattel interest (*j*), in the name of a stranger, *the equitable ownership results to the person from whom the consideration moved.

4. **Joint advance and purchase in name of third person.**—In *Crop v. Norton* (*a*) Lord Hardwicke doubted whether the rule was not confined to an individual purchaser. But in *Wray v. Steele* (*b*) the point was expressly decided in conformity with the general principle; for what was there applicable to an advance by a *single* individual which was not equally applicable to a *joint* advance under similar circumstances?

5. **Joint advance and purchase as joint-tenants.**—If two persons, joining in a purchase, take the conveyance not in the name of a *stranger*, or of *one* of themselves, but in the names of *both* of themselves as joint-tenants, then a distinction must be observed between an *equal* and an *unequal* contribution.

Equal contribution.—In the former case there is nothing on which to ground the presumption of a resulting trust, for persons making equal advances might very consistently take an estate in joint-tenancy, as each has it in his power to compel a partition, or by executing a conveyance to pass a moiety of the estate, and in the meantime each runs his own life against that of the other (*c*). And so, if two persons

(*f*) See *Aveling v. Knipe*, 19 Ves. 441. Ves. 253; *Garrick v. Taylor*, 29 Beav. 79.

(*g*) *Ebrand v. Dancer*, 2 Ch. Ca. 26. (*a*) *Barn.* 179; S. C. 9 Mod. 233; S. C. 2 Atk. 74.

(*h*) *Mortimer v. Davies*, cited *Rider v. Kidder*, 10 Ves. 363, 366. (*b*) 2 V. & B. 388.

(*i*) *Rider v. Kidder*, 10 Ves. 360; *Loyd v. Read*, 1 P. W. 607; and see *Sidmouth v. Sidmouth*, 2 Beav. 447; *Garrick v. Taylor*, 29 Beav. 79; *Beecher v. Major*, 2 Dr. & Sm. 431. (*c*) *Robinson v. Preston*, 4 K. & J. 505; *Rea v. Williams*, Append. to Sugd. Vend. and Purch. 11th Ed.; *Moyse v. Gyles*, 2 Vern. 385; *York v. Eaton*, 2 Freem. 23; *Rigden v. Vallier*, 3 Atk. 735, per Lord Hardwicke; *Hayes v. Kingdome*, 1 Vern.

(*j*) See *Ex parte Houghton*, 17

contract for a purchase in favour of them and their heirs, and one of them dies, the Court, if they paid equal proportions, will specifically perform the agreement, by ordering a conveyance, not to the heir of the deceased person and the survivor as tenants in common, but to the survivor alone (*d*). But even where equal contributors take a conveyance in joint-tenancy, collateral circumstances may induce a Court of Equity to construe it a tenancy in common (*e*).

Mortgage.—Thus where two tenants in common, of a mortgage term, purchased the equity of redemption to them and their heirs, it was held that the nature of the inheritance should follow that of the term (*f*); for if two persons join in lending money upon mortgage, equity says it could not have been the intention that the interest in that should survive, but though they took a joint security, each meant to lend his own, and take back his own (*g*).

Trading.—And in all cases of *a joint undertaking [*165] or partnership, by way of trade, or upon the hazard of profit and loss, the *jus accrescendi* is excluded, and the survivors are trustees, in due proportions, for the representatives of those who are dead (*a*).

Subsequent improvement by one.—And where the purchasers pay equally, and take a joint estate, and one afterwards *improves* the property at his own cost, he has a lien upon the land *pro tanto* for the money he has expended (*b*).

Unequal contribution.—Should the contribution of the

33; *Aveling v. Knipe*, 19 Ves. 444, *per* Sir W. Grant; *Lake v. Gibson*, 1 Eq. Ca. Ab. 291, *per* Sir Jos. Jekyll; *Anon. Carth.* 16; *Bone v. Pollard*, 24 Beav. 288; and see *Thicknesse v. Vernon*, 2 Freem. 84.

(*d*) *Aveling v. Knipe*, 19 Ves. 441.

(*e*) *Robinson v. Preston*, 4 K. & J. 506.

(*f*) *Edwards v. Fashion*, Pr. Ch. 352; and see *Aveling v. Knipe*, 19 Ves. 444.

(*g*) *Morley v. Bird*, 3 Ves. 681, *per* Lord Alvanley; *Rigden v. Vallier*, 3 Atk. 734, *per* Lord Hardwicke; *Anon. case Carth.* 16; *Partridge v. Pawlet*,

1 Atk. 487; *Petty v. Styward*, 1 Ch. Rep. 57; *Vickers v. Cowell*, 1 Beav. 529; and see *Robinson v. Preston*, 4 K. & J. 511.

(*a*) *Lake v. Gibson*, Eq. Ca. Ab. 290; S. C. (by name of *Lake v. Craddock*) affirmed 3 P. W. 158; *Jeffereys v. Small*, 1 Vern. 217; *Elliot v. Brown*, cited *Jackson v. Jackson*, 9 Ves. 597; *Lyster v. Dolland*, 1 Ves. jun. 434, 435, *per* Lord Thurlow; and see *York v. Eaton*, 2 Freem. 23; *Bone v. Pollard*, 24 Beav. 288.

(*b*) *Lake v. Gibson*, 1 Eq. Ca. Ab. 291, *per* Sir J. Jekyll.

parties be *unequal* then in all cases a trust results to each of them in proportion to the amount originally subscribed (*c*).

6. Copyhold grant to A. for life, and fine paid by B., who on B.'s death shall have it? — If A. discharge the fine on a grant of *copyholds* to B., C., and D. successively for their lives, the equitable interest will result to A.; but should A. die intestate, on whom will the remaining equity devolve? Estates *pur autre vie* in copyholds were not within the Statute of Frauds (*d*), nor the 14 G. 2, c. 20, s. 9. (*e*), nor is there a general occupancy of a trust (*f*), and before the late Wills Act the questions were asked, Can the *heir* take an estate which has no descendible property? or can the *executor* claim as assets what is not of the nature of personalty? or shall the tenants of the legal estate become the beneficial proprietors in the absence of any one to advance a better title? (*g*) In *Clark v. Danvers* (*h*) the plaintiff was both *heir* and *executor* of the equitable owner, and was decreed the benefit of the trust. In *Howe v. Howe* (*i*) the administratrix was held entitled, and so it was allowed in *Rundle v. Rundle* (*j*), and *Withers v. Withers* (*k*), and was subsequently sanctioned by the high authority of Lord Mansfield (*l*). Now by the late Wills Act (7 W. 4, and 1 Vict. c. 26, s. 6.) it is declared, that, where there is no special occupant, an estate *pur autre vie* whether in freehold or in copyhold shall, if not disposed of by the will of the grantee, go to his personal representative (*m*).

[*166] * 7. Purchase of a ship in stranger's name. — The Court cannot imply a resulting trust in evasion of

(*c*) *Lake v. Gibson*, 1 Eq. Ca. Ab. 291, per Sir J. Jekyll; *Rigden v. Valier*, 3 Atk. 735, per Lord Hardwicke; *Hill v. Hill*, 8 I. R. Eq. 140; affirmed *Ib.* 622.

(*d*) 29 Car. 2, c. 3, s. 12.

(*e*) *Rundle v. Rundle*, Amb. 152.

(*f*) *Penny v. Allen*, 7 De G. M. & G. 422; and see *Castle v. Dod*, Cro. Jac. 200.

(*g*) See *Jones v. Goodchild*, 3 P. W. 33, note B.

(*h*) 1 Ch. Ca. 310.

(*i*) 1 Vern. 415.

(*j*) 2 Vern. 252, 264; S. C. Amb. 152.

(*k*) Amb. 151.

(*l*) *Goodwright v. Hodges*, 1 Watk. Cop. 228; and see *Rumboll v. Rumboll*, 2 Eden, 15.

(*m*) *Reynolds v. Wright*, 25 Beav. 100; 2 De G. F. & J. 590. [Where leaseholds for lives were conveyed to trustees, their executors, administrators, and assigns in trust (in the events which happened) for certain persons absolutely but without words of limitation it was held in a case in Ireland,

an act of parliament, and therefore [under the old Registry Acts,] if A., on purchasing a ship, took the transfer in the name of B., the complete ownership, both legal and equitable, was in B. (a). In order to enforce the navigation laws, and secure to British subjects the exclusive enjoyment of British privileges, the Registry Acts required an exact history to be kept of every ship, how far throughout her existence she had been British built and British owned, and if implied trusts were permitted the whole intent of the legislature might have been indirectly defeated (b).

Exceptions to the rule. — However, in certain cases [even under the old law a person might have been] the registered owner and still have been a trustee. When, for instance, one of the members of a firm had a ship registered in his name, it was held by him in trust for the firm including the other partners (c). And when a ship was registered by mistake in the name of a person who was not the owner of it, and where the person who transferred it to him had no interest in it, the transferee did not acquire such a title to the ship as to deprive the rightful owner of it (d). [And in delivering judgment in the case of *Holderness v. Lampport*, Sir J. Romilly, M.R., observed,] “If letters of administration were obtained to the estate of a ship-owner, and the administrator transferred the ship into his own name, and afterwards a will was discovered and probate granted to the executor, could it be contended that the executor was precluded from obtaining the ship, because another person had, *bond fide* but by mistake, been registered as the owner?” (e).

[Recent statutes. — The law has, however, been lately modified so as to allow of a beneficial interest in a ship in persons not appearing on the register, and under the Acts

that the personal representatives of the *cestuis que trust*, became entitled on their deaths to the property, either as special occupants, as indicated in the grant, or under the statute in default of a special occupant; *Croker v. Brady*, 4 L. R. Ir. 653; overruling *S. C.* 4 L. R. Ir. 61.]

(a) *Ex parte Yallop*, 15 Ves. 60;

Ex parte Houghton, 17 Ves. 251; *Camden v. Anderson*, 5 T. R. 709.

(b) See *Ex parte Yallop*, 15 Ves. 66, 69.

(c) *Holderness v. Lampport*, 29 Beav. 129, *per M. R.*

(d) *Holderness v. Lampport*, 29 Beav. 129.

(e) *Ib.*

now in force, although no notice of a trust is allowed on the register, equities may be enforced against the registered owners of ships or shares of ships in the same manner as they may be enforced in respect of any other personal property (*f*), * and it follows that if a ship be purchased by A. in the name of a stranger, there will be a resulting trust in favour of A.]

8. **Resulting trusts under papistry acts.**—While the papistry laws were in force, if A., a papist, had purchased an estate in the name of B., the Court could not have presumed a resulting trust to A., which as soon as raised, would have become forfeitable to the State (*a*).

9. **In purchases for giving votes.**—And so if a purchaser take a conveyance in the name of another, with a view of giving him a vote for a member of parliament, he cannot afterwards claim the beneficial ownership, for the operation of such a right would render the original purchase fraudulent (*b*).

[10. **Patents, designs and trade marks.**—Under the Patents, Designs and Trade Marks Act, 1883, no notice of any trust is allowed on the register, and the registered proprietor of a patent, copyright in a design, or trade mark, as the case may be, is empowered (subject to any rights appearing from the register to be vested in any other person) absolutely to assign, grant licences as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, licence, or dealing. But any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property (*c*).]

11. **Parol evidence as regards Statute of Frauds.**—As the Statute of Frauds (*d*) extends to creations or declarations of trusts by parties only, and does not affect, indeed expressly excepts, trusts arising by operation or construction of law, it is competent for the real purchaser to prove his payment of

[*f*] See 17 & 18 Vict. c. 104, ss. 37, *et seq.*; 25 & 26 Vict. c. 63, s. 3; and see *Chasteauneuf v. Capeyron*, 7 App. Cas. 127.]

(*a*) See *Redington v. Redington*, 3 Ridge. 184.

(*b*) *Groves v. Groves*, 3 Y. & J. 163, see 172, 173.

[(*c*) 46 & 47 Vict. c. 57, ss. 86, 87.]

(*d*) 29 Car. 2, c. 3.

the purchase-money by *parol*, even though it be otherwise expressed in the deed.

In *Kirk v. Webb* (e) the Court refused to admit evidence, and the decision was followed in subsequent cases (f); however, the doctrine, though supported by numerous precedents, has since been clearly overthrown by the concurrent authority of the most distinguished judges (g).

***Purchase by an agent.** — The rule as at present [*168] established will not warrant the admission of *parol* evidence, where an estate is purchased by an *agent*, and no part of the consideration is paid by the employer; for though an agent is a trustee in equity, yet the trust is one arising *ex contractu*, and not resulting by operation of law (a). The agent may be indicted for perjury in denying his character, and may be convicted, yet the Court has no power to decree the trust (b). The employer, therefore, as he could not profit by the conviction, was never prevented by interest from being a witness against the agent (c).

Parol evidence must be clear. — And *parol* evidence, where admitted, must prove the fact very *clearly* (d); though no objection lies against the reception of *circumstantial* evidence, as that the means of the pretended purchaser were so slender as to make it impossible he should have paid the purchase-money himself (e).

(e) *Prec. Ch.* 84.

(f) *Heron v. Heron*, Pr. Ch. 163; S. C. *Freem.* 246; *Skett v. Whitmore*, *Freem.* 280; *Kinder v. Miller*, Pr. Ch. 172; and see *Halcott v. Markant*, Pr. Ch. 168; *Hooper v. Eyles*, 2 Vern. 480; *Newton v. Preston*, Pr. Ch. 103; *Cox v. Bateman*, 2 Ves. 19; *Ambrose v. Ambrose*, 1 P. W. 321; *Deg v. Deg*, 2 P. W. 414. The earlier case of *Gascoigne v. Thwing*, 1 Vern. 366, was in harmony with the modern doctrine.

(g) *Ryall v. Ryall*, 1 Atk. 59; S. C. *Amb.* 413; *Willis v. Willis*, 2 Atk. 71; *Bartlett v. Pickersgill*, 1 Eden, 515; *Lane v. Dighton*, *Amb.* 409; *Knight v. Pechey*, 1 Dick. 327; S. C. cited from MS. 3 *Vend. & Purch.* 258;

Groves v. Groves, 3 Y. & J. 163; *Lench v. Lench*, 10 Ves. 517; *Gray v. Lucas*, W. N. 1874, p. 223.

(a) *Bartlett v. Pickersgill*, 1 Eden, 515; *Rastel v. Hutchinson*, 1 Dick. 44; *Lamas v. Bayly*, 2 Vern. 627; *Atkins v. Rowe*, *Mose.* 39; S. C. *Cas. Dom. Proc.* 1730.

(b) *Bartlett v. Pickersgill*, 1 Eden, 517.

(c) *King v. Boston*, 4 East, 572.

(d) *Gascoigne v. Thwing*, 1 Vern. 366; *Halcott v. Markant*, Pr. Ch. 168; *Willis v. Willis*, 2 Atk. 71; *Goodright v. Hodges*, 1 Watk. Cop. 229, per Lord Mansfield; *Groves v. Groves* 3 Y. & J. 163; and see *Rider v. Kidder*, 10 Ves. 364.

(e) *Willis v. Willis*, 2 Atk. 71, per

Trust may be proved against defendant's denial. — And should the nominal purchaser *deny* the trust by his answer the solemnity of the defendant's oath will of course require a considerable weight of evidence to overcome its impression (*f*).

12. Of written evidence after the death of the nominal purchaser. — It is laid down by Mr. Sanders, that "if a person at his death leave any papers disclosing the real circumstances of the case, the Court will raise the trust even against the express declaration of the purchase-deed" (*g*). We have seen that, according to the latest authorities, parol evidence is in ordinary cases admissible against the language of the purchase-deed; but if Mr. Sanders's opinion to the contrary were well founded, it does not appear how mere papers would satisfy the requisitions of the statute; for, to have that effect, the writings ought also to be *signed* by the party. The cases of *Ryall v. Ryall* (*h*) and *Lane v. Dighton* (*i*), which are cited for the position, do not at all turn upon the distinction suggested.

13. Of parol evidence after the death of the nominal purchaser. — It is observed by the same writer, that, "*after the death of the supposed nominal purchaser*, parol proof alone can in no instance be admitted against the express declaration of the *deed" (*a*); but the cases relied upon in support of this doctrine (*b*) do not distinguish between proofs in a person's lifetime and after his decease; they are certainly authorities for the exclusion of parol evidence universally, but in this respect, as before noticed, they have been subsequently overruled. It would seem upon principle, that the death of the nominal purchaser cannot affect the *admissibility* of parol testimony, whatever effect it may have in detracting from its *weight*.

Lord Hardwicke; and see *Lench v. Lench*, 10 Ves. 518; *Wilkins v. Stevens*, 1 Y. & C. C. C. 431.

(*f*) See *Cooth v. Jackson*, 6 Ves. 39.

(*g*) *Uses and Trusts*, c. 3, s. 7, div. 2.

(*h*) Amb. 413.

(*i*) Amb. 409.

(*a*) *Uses and Trusts*, c. 3, s. 7, div. 2.

(*b*) *Kirk v. Webb*, Pr. Ch. 84; S. C. Freem. 229; *Heron v. Heron*, Pr. Ch. 163; *Halcott v. Markant*, Id. 168; *Kinder v. Miller*, Id. 172; S. C. 2 Vern. 440; *Deg v. Deg*, 2 P. W. 414, *per* Lord King.

14. **Of following trust-money into land.**—In the question, whether a purchase in the name of a third person can be established by parol testimony, is also involved the question, whether trust-money can be followed into *land* by parol. A purchase with trust-money is virtually a purchase paid for by the *cestuis que trust*; and on the ground that such a purchase is a trust resulting by operation of law, and not within the purview of the Statute of Frauds, it has been settled that parol evidence is clearly admissible (*c*).

15. **The resulting trust may be rebutted by parol.**—As in the cases we have been considering the trust results to the real purchaser by presumption of law, which is merely an *arbitrary implication* in the absence of *reasonable proof* to the contrary, the nominal purchaser is at liberty to rebut the presumption by the production of parol evidence showing the intention of conferring the beneficial interest (*d*); and the evidence to rebut need not be as strong as evidence to create a trust (*e*). And as he may repel the presumption *in toto*, so may he in part; as by proving the purchaser's intention to permit the legal tenant to enjoy beneficially for life (*f*); [or where stock has been transferred into the joint names of the transferor and another person by proving the intention of the transferor to have the dividends for his life, and that the transfer should enure for the benefit of such other person if he survived the transferor (*g*).]

*16. **Declarations subsequent to the purchase.**—[*170] When it has been once ascertained that the understanding of the parties at the time of the purchase was that the legal owner should also be the beneficial owner, it is not

(*c*) *Lench v. Lench*, 10 Ves. 517, per Sir W. Grant; *Ryall v. Ryall*, 1 Atk. 59; *S. C. Amb.* 418; *Lane v. Dighton*, Amb. 409; *Balgney v. Hamilton*, Amb. 414; *Trench v. Harrison*, 17 Sim. 111.

(*d*) *Goodright v. Hodges*, 1 Watk. Cop. 227; *S. C. Lofft*, 230; *Rider v. Kidder*, 10 Ves. 364; *Rundle v. Rundle*, 2 Vern. 252, 264; *Taylor v. Taylor*, 1 Atk. 386; *Redington v. Redington*, 3 Ridg. 106; see 165, 177, 178;

[*Standing v. Bowring*, 27 Ch. D. 341;] *Garrick v. Taylor*, 29 Beav. 79; *Beecher v. Major*, 2 Dr. & Sm. 431.

(*e*) *Nicholson v. Mulligan*, 3 I. R. Eq. 332, per cur.

(*f*) *Rider v. Kidder*, 10 Ves. 360; see 368; *Benbow v. Townsend*, 1 M. & K. 506; and see *Nicholson v. Mulligan*, 3 I. R. Eq. 308.

(*g*) *Standing v. Bowring*, 27 Ch. D. 341.]

competent to the person who paid the money to put a different construction upon the instrument at any subsequent period, and claim the estate against his intentions at the time (a); and even if under such circumstances the legal tenant agreed afterwards to execute a conveyance to the person who paid the money, the Court would not enforce the contract, if merely voluntary (b).

17. **Effect of time.**—The real purchaser may be barred of his interest by laches, for the presumption of a resulting trust will not be raised, after a great length of time, more particularly if it be in opposition to the evidence afforded by the actual enjoyment (c).

Secondly: Where the purchase is made by a person in the name of a child, or wife, or near relative.

Advancement.—Where a father purchases in the name of his child, the presumption of law is, that a provision was intended (d). The grounds of this doctrine are well stated by Lord Chief Baron Eyre (e).

(a) *Groves v. Groves*, 3 Y. & J. 172, *per* Alexander, C. B.

(b) *Groves v. Groves*, 3 Y. & J. 163.

(c) *Delane v. Delane*, 7 B. P. C. 279; and see *Groves v. Groves*, 3 Y. & J. 172; *Clegg v. Edmondson*, 8 De G. M. & G. 787.

(d) *Dyer v. Dyer*, 2 Cox, 93; S. C. 1 Watk. Cop. 219, *per* Eyre, C. B.; *Grey v. Grey*, 2 Swans. 597; S. C. Finch, 340, *per* Lord Nottingham; *Sidmouth v. Sidmouth*, 2 Beav. 454, *per* Lord Langdale; *Redington v. Redington*, 3 Ridg. 176, *per* Lord Loughborough; *Christy v. Courtenay*, 13 Beav. 96; *Elliot v. Elliot*, 2 Ch. Ca. 231, agreed; *Bedwell v. Froome*, cited 2 Cox, 97, and 1 Watk. Cop. 224, *per* Sir T. Sewell; *Goodright v. Hodges*, 1 Watk. Cop. 228, *per* Lord Mansfield; *Pole v. Pole*, 1 Ves. 76, *per* Lord Hardwicke; *Lamplugh v. Lamplugh*, 1 P. W. 111, 2nd point; *Woodman v. Morrel*, 2 Freem. 33, *per cur.*; *Murless v. Franklin*, 1 Sw. 17,

18, *per* Lord Eldon; *Finch v. Finch*, 15 Ves. 50, *per eundem*; *Fearne's P. W.* 327, &c. ["Where money is paid by one man to another, the legal presumption is that it was paid in discharge of some prior debt or obligation, and not that it was meant as a gift; and if money is paid by a father to a son, and nothing beyond the fact of payment is proved, there is no legal obligation on the son to repay it, and the equitable doctrine that there is a presumption that moneys advanced by a father to a son are intended as a gift has no application. The onus of proof is in the person who claims repayment to show that there was some contract rendering the payee liable to repay the money," *per* Jessel, M. R., *Ex parte Cooper*, W. N. 1882, p. 96.]

(e) *Dyer v. Dyer*, 2 Cox, 94; S. C. 1 Watk. Cop. 218; and see Lord Nottingham's observations in *Grey v. Grey*, 2 Sw. 598.

The relationship of father and child a mere circumstance of evidence. — “The circumstance,” he said, “of one or more of the nominees being a child or children of the purchaser, is held to operate by *rebutting the resulting trust*; and it has been determined in so many cases that the nominee being a child shall have such operation as a *circumstance of evidence*, that it would be disturbing *landmarks if [*171] we suffered either of these propositions to be called into question; — namely, That such circumstance shall rebut the resulting trust; and, That it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as *purchasers for valuable consideration*. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea without very certain guides.”

The difficulties arising from the light in which the question has been viewed will amply appear from the numerous refined distinctions upon which the Court from time to time has been called upon to adjudicate.

1. *Case of the child being an infant*. — A distinction was formerly taken where the child was an *infant* (a); for a parent, it is said, could scarcely have intended to bestow a separate and independent provision upon one utterly incapable of undertaking the management of it. But still more improbable was the supposition that an infant should have been selected as a trustee (b), and accordingly the notion has long since been overruled (c); nay, the infancy of the

(a) 2 Freem. 128, c. 151; and see *Sw. 600; Skeats v. Skeats*, 2 Y. & C. C. 9; *Christy v. Courtenay*, 13 Beav. 96; *Collinson v. Collinson*, 3

(b) See *suprà*, p. 37. De G. M. & G. 403; *Mumma v. Mumma*, 2 Vern. 19; *Finch v. Finch*, 15 Ves. 43, &c.

(c) *Lamplugh v. Lamplugh*, 1 P. W. 111; *Lady Gorge's case*, cited 2

child is now looked upon as a circumstance particularly favourable (*d*).

2. *Purchase of a reversionary estate.*—It was objected, that a *reversionary estate*, from the uncertainty of the time when it would fall into possession, was not such a kind of interest as a parent would prudently purchase by way of provision for a child; but mere proximity or remoteness of the enjoyment, whether the reversion be expectant on the decease of the parent or a stranger, has since been held clearly insufficient to countervail the general rule (*e*).

3. *Purchase in joint names of father and son.*—A purchase in the *joint* names of the father and son has met with objections; “for this,” observed Lord Hardwicke, “does not answer the purpose of an advancement, as it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the [*172] father’s taking a chance to *himself of being a survivor of the other moiety: nay, if the son die during his minority, the father would be entitled to the whole by survivorship, and the son could not prevent it by severance, he being an infant” (*a*). But surely no improvidence can be justly charged on a parent who so settles his estate, that if the son die a minor it shall revert to himself; that until the marriage of the son or other pressing occasion, the father and son shall possess an equal interest during their joint lives, with the right of survivorship as to the whole; that the son shall have the power, when necessary, of settling one moiety of the estate, but shall leave the other moiety to his parent. Whatever opinion may be entertained as to the *principle*, the doubts above expressed by Lord Hardwicke can scarcely be maintained in opposition to repeated decisions (*b*). A purchase in the joint names of the son and a *stranger* is less favourable to the supposition of an intended

(*d*) Fearn’s P. W. 327.

(*e*) Rumboll v. Rumboll, 2 Eden, 17, per Lord Henley; Finch v. Finch, 15 Ves. 43; Murless v. Franklin, 1 Sw. 13.

(*a*) Stileman v. Ashdown, 2 Atk. 480; and see Pole v. Pole, 1 Ves. 76.

(*b*) Scroope v. Scroope, 1 Ch. Ca. 27; Back v. Andrews, 2 Vern. 120; Grey v. Grey, 2 Sw. 599, and cases there cited; Dummer v. Pitcher, 2 M. & K. 272.

advancement (*c*); but even here the right of the child is now indisputably established (*d*). However, the advancement cannot be *more extensive than the legal estate in the child* (*e*); and therefore the *stranger, quatenus* the legal estate vested in *him*, must hold upon trust for the father (*f*).

4. **Purchase of copyholds granted for lives successive.**—It is the custom, in many manors, to make grants for lives *successive*. Should a father pay a fine upon a grant to himself and his two sons, shall this be held an advancement or a trust? Upon the difficulty of this case, Lord Chief Baron Eyre remarked, that “when the lessees where to take *successive*, the father could not take the whole in his own name, but *must* insert other names in the lease, and that there might be many prudential reasons for putting in the life of a child as trustee for him, in preference to any other person” (*g*). And in accordance with this reasoning was decided the case of *Dickinson v. Shaw* (*h*); but in *Dyer v. Dyer* (*i*) the notion was overruled as savouring too much of refinement; and so at the present day it must be considered as settled (*j*).

* 5. **Child already provided for.**—It may happen, [*173] that the child in whose name the purchase is taken may have been *already provided for*, a circumstance of very considerable weight in rebutting the presumption of further advancement. “The rule of equity,” said Lord Chief Baron Eyre, “as recognised in other cases, is, that the father is the only judge on the question of a son’s provision, and therefore the distinction of the son being provided for or not is not very solidly taken” (*a*). However, the distinction has been

(*c*) See *Hayes v. Kingdome*, 1 Vern. 34.

(*d*) *Lamplugh v. Lamplugh*, 1 P. W. 111; *Kingdome v. Bridges*, 2 Vern. 67. [And see *Re Eykyn’s Trusts*, 6 Ch. D. 115.]

(*e*) See *Rumboll v. Rumboll*, 1 Eden, 17.

(*f*) See *Kingdome v. Bridges*, 2 Vern. 67; *Lamplugh v. Lamplugh*, 1 P. W. 112.

(*g*) *Dyer v. Dyer*, 2 Cox, 95; S. C. 1 Watk. Cop. 221.

(*h*) Cited 2 Cox, 95; 1 Watk. Cop. 221.

(*i*) 2 Cox, 92; 1 Watk. Cop. 216.

(*j*) *Swift v. Davis*, 8 East, 354, note (*a*); *Fearne’s P. W.* 327; *Skeats v. Skeats*, 2 Y. & C. C. C. 9; *Jeans v. Cooke*, 24 Beav. 513.

(*a*) *Dyer v. Dyer*, 2 Cox, 94; S. C. 1 Watk. Cop. 220.

relied upon in several cases (*b*), and has been repeatedly recognised by the highest authorities (*c*). At the same time, it must be noticed that the prior advancement of the child has always been accompanied with some additional circumstance that tended to strengthen the presumption that no further provision was designed (*d*); and Lord Loughborough laid down the general rule to be, that a purchase made by a father in the name of a son, already fully advanced and established by him, not *was*, but *might* be, a trust for the father (*e*).

Whether child considered as provided for when adult. — It is said by Lord Chief Baron Gilbert, that “if a father purchase in the name of a son *who is full of age, which by our law is an emancipation out of the power of the father*, there if the father take the profits, &c., the son is a trustee for the father” (*f*). But for this opinion there appears to be not the slightest ground (*g*). The provision must exist not by a fiction of law, but *bonâ fide* and substantially; “as,” said Lord Nottingham, “if the son be married in his father’s lifetime, and with his father’s consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated” (*h*).

Previous provision in part. — **Reversionary estate not a provision.** — A provision in part will not have the effect of rebutting the presumption of advancement (*i*); and the settlement of a reversionary estate upon the son will not be deemed a provision, for he might starve before it fell into possession (*j*).

6. Case of father holding the possession, and child an infant.

— **Son signing receipts for rents in father’s name.** — Suppose the father continues, after the purchase, in the perception of the

(*b*) *Elliot v. Elliot*, 2 Ch. Ca. 231; *Ridg.* 190; and see *Sidmouth v. Sidmouth*, 2 Beav. 456.

(*c*) See *Grey v. Grey*, 2 Sw. 600; (*f*) *Lex. Præt.* 271.
S. C. Finch, 341; *Lloyd v. Read*, 1 P. W. 608; *Redington v. Redington*, 3 (*g*) In *Grey v. Grey* (*ubi supra*)
Ridg. 190; *Gilb. Lex. Præt.* 271. for instance, the son was of age.

(*d*) *Pole v. Pole*, *Elliot v. Elliot*, (*h*) *Grey v. Grey*, 2 Sw. 600.
ubi supra; and see *Grey v. Grey*, 2 (*i*) *Ib.*; *Redington v. Redington*,
Sw. 600; *Gilb. Lex. Præt.* 271. 3 *Ridg.* 190.

(*e*) *Redington v. Redington*, 3 (*j*) *Lamplugh v. Lamplugh*, 1 P. W. 111.

rents and profits, and exerts other acts of ownership, then, if the son be an infant, it is said, as the parent is the natural *guardian* of the child, the perception of the profits or other exercise * of dominion shall be referred to that [*174] ground, and the right of the son shall not be prejudiced, and so in numerous cases the point has been adjudged (a); and it will not vary the case if the son sign receipts in the name of the father, for during his minority he could give no other receipts that would discharge the tenants who hold by lease from his father (b).

Chief Baron Eyre's opinion. — **Lord Nottingham's opinion.** — Lord Chief Baron Eyre expressed himself dissatisfied with this reasoning in reference to the guardianship (c), and Lord Nottingham referred the decisions to a higher ground. "Some," he said, "have taken the difference, that where the father has colour to receive the rents as guardian, there perception of profits is no evidence of a trust: otherwise it would be if the perception of profits were without any such colour. Plainly the reason of the resolutions stands not upon the *guardianship*, but upon the *presumptive advancement*, for a purchase in the name of an infant *stranger* (that is, notwithstanding the relation of guardian and ward) with perception of profits, &c., will be evidence of a trust" (d).

7. Case of a father holding the possession, and son adult. — Suppose the father purchases in the name of the son who is *adult*, and then, without contradiction from the son, takes the rents and profits, and exerts other acts of ownership; even here it has been determined that the right of the son will prevail.

Grey v. Grey. — A stronger instance can hardly be conceived than occurred in the very leading case of *Grey v. Grey* (e), before Lord Nottingham. We have his lordship's own manuscript of this case, and the circumstances are thus

(a) *Gorge's case*, cited Cro. Car. 96; *Fox v. Fox*, 15 Ir. Ch. Rep. 550, & 2 Sw. 600; *Mumma v. Mumma*, 89.
 2 Vern. 19; *Taylor v. Taylor*, 2 Atk. 386; *Lamplugh v. Lamplugh*, 1 P. W. 111; and see *Stileman v. Ashdown*, 2 Atk. 480; *Lloyd v. Read*, 1 P. W. 606; *Christy v. Courtenay*, 13 Beav. 96.
 (b) *Taylor v. Taylor*, 1 Atk. 886.
 (c) *Dyer v. Dyer*, 2 Cox, 94; S. C. 1 Watk. 220.
 (d) *Grey v. Grey*, 2 Sw. 600.
 (e) 2 Sw. 594; Finch, 338.

stated:—"The evidence to prove this purchase in the name of the son to be a trust for the father consists of—1st, father possessed the money; 2dly, received the profits twenty years; 3dly, made leases; 4thly, took fines; 5thly, enclosed part in a park; 6thly, built much; 7thly, provided materials for more; 8thly, directed Lord Chief Justice North to draw a settlement; 9thly, treated about the sale of it" (*f*): yet, for all this, it was decided, after long and mature deliberation, that the consideration of blood and affection was so predominant, that the father's perception of rents and profits, or making leases, or the like acts, which the son, in good manners, did not contradict, could not countervail it (*g*).

[*175] The propriety of this decision, upon principle * independently of authority, has been called into question (*a*). It might perhaps be successfully contended, that Lord Nottingham's determination was founded upon the more enlarged view of the subject in respect even of *principle*; however, the point must at the present day be considered as settled at least upon *authority*, if any point can be considered as settled after repeated decisions (*b*).

[**Policy on father's life.**—So if a father effects a policy of assurance on his own life in the name of a child, and himself pays the premiums and retains the policy until the time of his death, the child will be entitled to the benefit of the policy (*c*).]

8. **Evidence from facts to rebut the presumption.**—The advancement of the son is a mere question of intention, and, therefore, facts *antecedent to* or *contemporaneous with* the purchase (*d*), or so *immediately after* it as to constitute part

(*f*) 2 Sw. 596.

(*g*) See 2 Sw. 599.

(*a*) Dyer v. Dyer, 2 Cox, 95; S. C. 1 Watk. Cop. 220.

(*b*) Woodman v. Morrell, 2 Freem. 32, reversed on the re-hearing (see note by Hovenden); Shales v. Shales, Ib. 252; Sidmouth v. Sidmouth, 2 Beav. 447; Williams v. Williams, 32 Beav. 370; Batstone v. Salter, 19 L. R. Eq. 250; 10 L. R. Ch. App. 431; and see Elliot v. Elliot, 2 Ch. Ca.

231; but see Lloyd v. Read, 1 P. W. 607; Redington v. Redington, 3 Ridg. 190; Murless v. Franklin, 1 Sw. 17; Scawin v. Scawin, 1 Y. & C. C. C. 65.

[(*c*) *Re Richardson*, 47 L. T. N. S. 514.]

(*d*) See Williams v. Williams, 32 Beav. 370; Tucker v. Burrow, 2 H. & M. 524; Collinson v. Collinson, 3 De G. M. & G. 409; Murless v. Franklin, 1 Sw. 17, 19; Sidmouth v. Sidmouth, 2 Beav. 447; Lloyd v. Read, 1 P. W.

of the same transaction (*e*), may properly be put in evidence for the purpose of rebutting the presumption. Thus it will not be held an advancement, if, on a grant of copyholds to a father and his son for their lives *successive*, the father at the same Court surrenders the copyholds to the use of his will (*f*), or obtains a license from the lord to lease for years (*g*), or takes possession by some overt act immediately consequent upon the purchase (*h*), or serves a notice with a view of taking possession, and then waives it and receives the rents, &c. (*i*).

Evidence from parol declaration. — So the father may prove a parol declaration of trust by himself, * either [*176] before or at the time of the purchase, not that it operates by way of declaration of trust (for the Statute of Frauds would interfere to prevent it); but as the trust would result to the father, were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration. Of course the father cannot defeat the advancement by any subsequent declaration of intention (*a*). But his evidence is admissible for the purpose of proving what was the intention at the time (*b*).

607; *Taylor v. Alston*, cited 2 Cox, 96, 1 Watk. Cop. 223; *Redington v. Redington*, 3 Ridg. 177; *Grey v. Grey*, 2 Sw. 594; *Rawleigh's case*, cited Hard. 497; *Baylis v. Newton*, 2 Vern. 28; *Shales v. Shales*, 2 Freem. 252; *Scawin v. Scawin*, 1 Y. & C. C. C. 65; *Christy v. Courtenay*, 13 Beav. 96.

(*e*) *Redington v. Redington*, 3 Ridg. 196, *per* Lord Loughborough; *Jeans v. Cooke*, 24 Beav. 521, *per* M. R.

(*f*) *Prankerd v. Prankerd*, 1 S. & S. 1.

(*g*) *Swift v. Davis*, 8 East, 354. note (*a*).

(*h*) Lord Eldon could scarcely have meant more than this, when he observed, "Possession taken by the father at the time would amount to such evidence." *Murless v. Franklin*, 1 Sw. 17.

(*i*) *Stock v. McAvoy*, 15 L. R. Eq. 55. In this case evidence was given that the father said it should be his son's after his own death, but V. C. Wickens observed, "If the son is a trustee at all, he is wholly a trustee," *ib.* 58.

(*a*) See *Williams v. Williams*, 32 Beav. 370; *Elliot v. Elliot*, 2 Ch. Ca. 231; *Finch v. Finch*, 15 Ves. 51; *Woodman v. Morrel*, 2 Freem. 33; *Birch v. Blagrove*, Amb. 266; *Gilb. Lex Præst.* 271; *Sidmouth v. Sidmouth*, 2 Beav. 456; *Skeats v. Skeats*, 2 Y. & C. C. C. 9; *Christy v. Courtenay*, 13 Beav. 96; *O'Brien v. Shiel*, 7 I. R. Eq. 255.

(*b*) *Devoy v. Devoy*, 3 Sm. & G. 403.

Evidence on the part of a child. — On the other hand, the son may produce parol evidence to prove the intention of advancement (c), and *a fortiori* such evidence is admissible on his side, as it tends to support both the legal operation and equitable presumption of the instrument (d). And it seems the subsequent acts and declarations of the father may be used *against* him by the son, though they cannot be used *in his favour* (e), and so the subsequent acts or declarations of the son may be used *against him* by the father, provided he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father (f); but not otherwise, for the question is, not what did the son, but what did the father mean by the purchase?

[Where the parties to the transaction are alive and give evidence, there is no occasion to resort to any presumption (g).]

9. **Rule not to be eluded by nice refinements.** — From the manner in which the Court has disposed of the several distinctions we have been considering, one general principle is to be extracted applicable to every case. "We think," said Chief Baron Eyre, "that reasons which partake of too great a degree of refinement should not prevail against a rule of property, which is so well established as to become a land mark, and which, whether right or wrong, should be [*177] carried throughout" (h); and Lord Eldon * to the same effect observed, "that the Court in *Dyer v. Dyer* meant to establish this principle, that the purchase is an advancement *prima facie*, and in this sense, that this principle of law and presumption is not to be frittered away by mere refinements" (a).

(c) *Taylor v. Alston*, cited 2 Cox, 96, 1 Watk. Cop. 223; *Beckford v. Beckford*, Lofft, 490.

(d) See *Taylor v. Taylor*, 1 Atk. 386; *Lamplugh v. Lamplugh*, 1 P. W. 113; *Redington v. Redington*, 3 Ridg. 182, 195.

(e) See *Redington v. Redington*, 3 Ridg. 195, 197; *Sidmouth v. Sidmouth*, 2 Beav. 455; *Stock v. McAvoy*, 15 L. R. Eq. 55.

(f) See *Murless v. Franklin*, 1 Sw. 20; *Pole v. Pole*, 1 Ves. 76; *Sidmouth v. Sidmouth*, 2 Beav. 455; *Scawin v. Scawin*, 1 Y. & C. C. C. 65; *Jeans v. Cooke*, 24 Beav. 521.

[(g) *Per* Lindley, L. J., *Ex parte* Cooper, W. N. 1882, p. 96.]

(h) 2 Cox, 96; 1 Watk. Cop. 226.

(a) *Finch v. Finch*, 15 Ves. 50.

10. **Rule applies to an illegitimate child.** — The doctrine of advancement has been applied to the case of even an *illegitimate son* (*b*); for it is said the principle is, that a father is under a moral duty to provide for his child, and as the obligation extends to the case of an illegitimate child, he is equally entitled to the benefit of the presumption (*c*). But the doctrine will not be applied to the illegitimate son of a legitimate child of the real purchaser, the person who paid the purchase-money, though such purchaser may have placed himself *loco parentis* to the illegitimate grandchild (*d*).

11. **Rule applies to daughters as well as sons.** — It has been said that the presumption of advancement is not so strong in favour of a *daughter* as of a *son*, because daughters are not generally provided for by a settlement of real estate (*e*); but the distinction has been contradicted by more than one decision, and does not now exist (*f*).

12. **Rule applies to a wife, and grandchild or nephew, towards whom the purchaser stands in loco parentis.** — Advancement will be presumed in the case of a *wife* (*g*), and this presumption may, as in that of a child, be rebutted by the special circumstances under which the transfer was made (*h*). But no presumption will arise in favour of a reputed wife, being the sister of a former wife, and therefore not legally married (*i*); and the presumption will be made where the purchase is taken in the name of a grandchild, where

(*b*) *Beckford v. Beckford*, Lofft, 490; *Fearne's P. W.* 327; and see *Soar v. Foster*, 4 K. & J. 160; *Kilpin v. Kilpin*, 1 My. & K. 520; *Tucker v. Burrow*, 2 H. & M. 525.

(*c*) See *Fonb. Eq. Tr.* 123, note (*i*), 4th ed.

(*d*) *Tucker v. Burrow*, 2 H. & M. 515.

(*e*) *Gilb. Lex. Præc.* 272.

(*f*) *Lady Gorge's case*, cited *Cro. Car.* 550, 2 Sw. 600; *Jennings v. Selleck*, 1 Vern. 467; and see *Woodman v. Morrel*, 2 Freem. 33; *Clark v. Danvers*, 1 Ch. Ca. 310.

(*g*) *Kingdome v. Bridges*, 2 Vern. 67; *Christ's Hospital v. Budgin*, id. 683; *Back v. Andrews*, id. 120; *Glaish*

ter v. Hewer, 8 Ves. 199, per Sir W. Grant; *Rider v. Kidder*, 10 Ves. 367, per Lord Eldon; *Gilb. Lex. Præc.* 272; *Dummer v. Pitcher*, 2 M. & K. 262; and see *Lloyd v. Pughe*, 14 L. R. Eq. 241; 8 L. R. Ch. App. 88.

(*h*) *Marshal v. Crutwell*, 20 L. R. Eq. 328; and M. R. further observed: "Now in all the cases in which a gift to the wife has been held to have been intended, the husband has retained the dominion over the fund in this sense, that the wife during the lifetime of the husband has had no power independently of him, and the husband has retained the power of revoking the gift." *Ib.* 330, *sed qu.*

(*i*) *Soar v. Foster*, 4 K. & J. 152.

[*178] the father is dead (*j*), or of a nephew * who had been adopted as a son (*a*); but it seems that the advancement will not be presumed in favour of a more remote relation, and *a fortiori* not of a stranger, though the real purchaser may have placed himself *loco parentis* (*b*).

[13. Case of investment in joint names of purchaser, his wife, and strangers. — The doctrine of advancement has been applied to the case of an investment by a husband in the joint names of himself, his wife, and strangers (*c*).]

14. Case of a mother. — The cases of advancement are generally those of a father, but [the question has arisen on several occasions whether the principle is applicable as between mother and child, and has given rise to some difference of opinion, but, on the balance of the authorities as well as on principle, it would seem that the true rule is, that, as a Court of Equity recognizes no such obligation according to the rules of equity in a mother to provide for her child as exists in the case of a father, the mere purchase or investment in the name of the child is not sufficient *per se* to raise a presumption of advancement, but there must be some evidence of intention on the part of the mother, either to place herself *in loco parentis* or to advance the child, to entitle the child to the property. However, very slight evidence of intention is sufficient, there being very little additional motive required beyond the relationship to induce a mother to make a gift to her child (*d*); and the principle] does not apply to a *step-mother* (*e*).

15. Purchase-money not paid, a debt from parent. — Where the purchase is held to be an advancement, and the purchase-

(*j*) *Ebrand v. Dancer*, 2 Ch. Ca. 26; and see *Loyd v. Read*, 1 P. W. 607; *Currant v. Jago*, 1 Coll. 265, note (*c*); *Tucker v. Burrow*, 2 H. & M. 525; *Fowkes v. Pascoe*, 10 L. R. Ch. App. 343.

(*a*) *Currant v. Jago*, 1 Coll. 261.

(*b*) See *Tucker v. Burrow*, 2 H. & M. 515; but see the analogous class of cases in reference to double portions, *Powys v. Mansfield*, 3 My. & Cr. 359, &c.

(*c*) *Re Eykyn's Trusts*, 6 Ch. D. 115.]

(*d*) *Re De Visme*, 2 De G. J. & Sm. 17; *Bennet v. Bennet*, 10 Ch. D. 474; *Re Orme*, 50 L. T. N. S. 51; but see *Sayre v. Hughes*, 5 L. R. Eq. 376; *Batstone v. Salter*, 10 L. R. Ch. App. 431.]

(*e*) *Todd v. Moorhouse*, 19 L. R. Eq. 69.

money has not been paid, it will be a charge on the father's assets as an ordinary debt (*f*); and the conveyance, where the contract in favour of the wife or child remains to be executed, will be made to the wife or child, though the real purchaser's executor pays the purchase-money, for it is not the case of a volunteer (*viz.*, the wife or child), calling for specific performance, but the vendor on his side has a right to enforce the contract and compel payment of the price, and then the Court settles the conveyance in the form in which, according to the contract, it was meant to be taken, *viz.*, in favour of the wife or child (*g*).

*16. **Advancement applies to personalty.**—Of [*179] course, the doctrine of advancement applies to personal as well as real estate; as where a father purchases stock in the name of his son (*a*), or daughter (*b*), [or transfers stock into the joint names of a married daughter and her husband (*c*).]

17. **Solicitor.**—In a recent case, where money was lent out in the name of a person who was both *son* and *solicitor* of the owner of the sum lent, it was held that the particular relation of solicitor prevented the application of the general rule (*d*).

(*f*) *Redington v. Redington*, 3 Ridg. 106, see 200; and see *Nicholson v. Mulligan*, 3 I. R. Eq. 308.

(*g*) *Drew v. Martin*, 2 H. & M. 190; and see *Nicholson v. Mulligan*, 3 I. R. Eq. 308.

(*a*) *Dummer v. Pitcher*, 2 M. & K. 263; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Hepworth v. Hepworth*, 11 L. R. Eq. 10; *Fox v. Fox*, 15 Ir. Ch.

Rep. 89; and see *Bone v. Pollard*, 24 Beav. 283; *Devoy v. Devoy*, 3 Sm. & G. 403.

(*b*) *O'Brien v. Sheil*, 7 I. R. Eq. 255.

[(*c*) *Batstone v. Salter*, 10 L. R. Ch. App. 431.]

(*d*) *Garrett v. Wilkinson*, 2 De G. & Sm. 244.

OF CONSTRUCTIVE TRUSTS.

1. **General doctrine.**—A *constructive trust* (a) is raised by a court of equity, *wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee*;¹ for as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a *legal* title he may have, will be decreed in *equity* to hold for the benefit of his *cestui que trust*.

2. **Renewal of leases.**—A common instance of a constructive trust occurs in the renewal of leases; the rule being, that if a trustee (b), or executor (c), or even an executor *de*

(a) As to the meaning of the term "constructive trust," see page 108, *suprà*.

(b) *Griffin v. Griffin*, 1 Sch. & Lef. 354, *per* Lord Redesdale; *Pickering v. Vowles*, 1 B. C. C. 198, *per* Lord Thurlow; *Pierson v. Shore*, 1 Atk. 480, *per* Lord Hardwicke; *Nesbitt v. Tredennick*, 1 B. & B. 46, *per* Lord

Manners; *Turner v. Hill*, 11 Sim. 13, *per* Sir L. Shadwell.

(c) *Walley v. Walley*, 1 Vern. 484; *Holt v. Holt*, 1 Ch. Ca. 190; *Abney v. Miller*, 2 Atk. 597, *per* Lord Hardwicke; *Killick v. Flexney*, 4 B. C. C. 161; *Pickering v. Vowles*, 1 B. C. C. 198, *per* Lord Thurlow; *Luckin v. Rushworth*, Finch, 392; *Anon.* 2

¹ **CONSTRUCTIVE TRUSTS.**—*Definition.*—"Constructive trusts include all those instances in which a trust is raised by the doctrine of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust"; 2 Pom. Eq. Jur. § 1044; *Perry on Trusts*, § 166; *Pillow v. Brown*, 26 Ark. 240; *Hollingshead v. Simms*, 51 Cal. 158; *McLane v. Johnson*, 43 Vt. 48; *Thompson v. Thompson*, 16 Wis. 91; *Collins v. Collins*, 6 Lans. 368; *Griffith v. Godey*, 113 U. S. 89.

Actual fraud.—No complete and satisfactory definition can be given, but it includes all acts, omissions, and concealments constituting a breach of duty, trust, or confidence, resulting in an unfair advantage to one and an injury to another; 1 Story Eq. Jur. § 187; *Gale v. Gale*, 19 Barb. 251. Though at law

son tort (d), renew a lease in his own name, he will be deemed in equity to be trustee for those interested in the original term.

Ch. Ca. 207; and see *Mulvany v. Dillon*, 1 B. & B. 409; *Fosbrooke v. Balguy*, 1 M. & K. 226; *Owen v. Williams*, Amb. 734; *Nesbitt v. Tredennick*, 1 B. & B. 46, *per Lord Man-*ners; [*Kelly v. Kelly*, 8 I. R. Eq. 403.]
(d) *Mulvany v. Dillon*, 1 B. & B. 409.

there may be an absence of liability, even with the presence of fraud, as in the case of minors, yet equity will relieve, for rules made to protect certain classes may not serve as a shield for their frauds; *Hall v. Timmons*, 2 Rich. Eq. 120; *Davis v. Tingle*, 8 B. Mon. 539; the simplest case of fraud is that arising from circumstances and facts of imposition; *Beegle v. Wentz*, 55 Pa. St. 369; where a transfer of a legal title has been procured by fraud, equity will compel a re-conveyance; *Smith v. Richards*, 13 Pet. 26; *Tyler v. Black*, 13 How. 231; *Dowd v. Tucker*, 41 Conn. 198; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Beach v. Dyer*, 93 Ill. 295; *Walker v. Dunlop*, 5 Hayw. 271; *Lewis v. McLemore*, 10 Yerg. 206; *Boyce v. Grundy*, 3 Pet. 210; *Prescott v. Wright*, 4 Gray, 461; *Laidlaw v. Organ*, 2 Wheat. 195; it is immaterial whether a party makes a false assertion knowingly or ignorantly; *Hazard v. Irwin*, 18 Pick. 86; *Hammatt v. Emerson*, 27 Me. 308; *Doggett v. Emerson*, 3 Story, 733; *Pratt v. Philbrook*, 33 Me. 17; equity will make a trustee of a purchaser at an auction sale who has prevented competition; *Pearson v. East*, 36 Ind. 27; *Gilmore v. Johnson*, 29 Ga. 67; *Soggins v. Heard*, 31 Miss. 426; *Wolford v. Herrington*, 74 Pa. St. 311; *Ferguson v. Williamson*, 20 Ark. 272; the principal is liable if he ratify the fraudulent act of his agent; *Kibbe v. Ins. Co.* 11 Gray, 163; *Fitzsimmons v. Joslyn*, 21 Vt. 129; *Elwell v. Chamberlin*, 31 N. Y. 619; *Stone v. Denny*, 4 Met. 161; *Oliver v. Piatt*, 3 How. 333; *Hess v. Dean*, 66 Tex. 663; the deception must be in matters of fact; *Rush v. Vought*, 55 Pa. St. 437; *Tyler v. Black*, 13 How. 230; *Best v. Stow*, 2 Sandf. 298; *Manning v. Albee*, 11 Allen, 522; *Medbury v. Watson*, 6 Met. 259; and not of opinion merely; *Hemmer v. Cooper*, 8 Allen, 334; *Speiglemyer v. Crawford*, 6 Paige, 254; *Hough v. Richardson*, 3 Story, 696; and of some material fact; *Clark v. Everhart*, 63 Pa. St. 347; *Stebbins v. Eddy*, 4 Mason, 414; *Winston v. Gwathmey*, 8 B. Mon. 19; peculiarly within the knowledge of one party; *Tindall v. Harkinson*, 19 Ga. 448; *Juzan v. Toulmin*, 9 Ala. 602; *Hobbs v. Parker*, 31 Me. 148.

Concealment.—If a person, standing in a fiduciary relation to another, keeps valuable information from him, he may become a constructive trustee; *Etting v. Bank of U. S.* 11 Wheat. 59; *Miller v. Welles*, 23 Conn. 33; *Mathews v. Bliss*, 22 Pick. 48; *Wellford v. Chancellor*, 5 Gratt. 39; this may be true if no such relation exists; *Evans v. Keeland*, 9 Ala. 42; *Bank v. Cooper*, 36 Me. 195; *Foote v. Foote*, 68 Barb. 258; *Hanson v. Edgerly*, 29 N. H. 343; *Bank v. Baxter*, 31 Vt. 101; *Babcock v. Case*, 61 Pa. St. 427; *Jenkins v. Eldredge*, 3 Story, 181; *Church v. Ruland*, 64 Pa. St. 432.

For fraud in case of will, see *Murray v. Murphy*, 39 Miss. 214; *Waters v. Stickney*, 12 Allen, 1; *Williams v. Fitch*, 18 N. Y. 546; *Tarver v. Tarver*, 9 Pet. 180; *Fouvergne v. New Orleans*, 18 How. 470; *Morningstar v. Selby*, 15 Ohio, 345; *Gaines v. Hennen*, 24 How. 553; *Allison v. Allison*, 7 Dana, 90.

If a conveyance is made through ignorance, accident, or mistake, equity

Rumford Market case.—The leading authority upon this subject is *Sandford v. Keech*, commonly called the *Rumford Market Case (e)*. A lessee of the profits of a market had

(e) Sel. Ch. Ca. 61.

will relieve, though there be no fraud; *Beard v. Campbell*, 2 A. K. Marsh. 125; *Freeman v. Curtis*, 51 Me. 140; *Storrs v. Barker*, 6 Johns. Ch. 189; *Magniac v. Thomson*, 2 Wall. Jr. 209; *Mellish v. Robertson*, 25 Vt. 608; *Loss v. Obry*, 7 C. E. Green, 52; *Sawyer v. Hovey*, 3 Allen, 331; *Andrews v. Ins. Co.* 3 Mason, 10; *Bloodgood v. Sears*, 64 Barb. 76.

Inadequacy of consideration may be a ground for relief, and that too without showing fraud; *Erwin v. Parham*, 12 How. 197; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Powers v. Hale*, 5 Foster, 145; *Mann v. Betterly*, 21 Vt. 326; *Coster v. Griswold*, 4 Edw. 364; *Barnett v. Spratt*, 4 Ired. Eq. 171; *Horsey v. Hough*, 38 Md. 130; *Booker v. Anderson*, 35 Ill. 66; *Gasque v. Small*, 2 Strobl. Eq. 72; *Esham v. Lamar*, 10 B. Mon. 43; especially if it be a contract with heirs; *Jenkins v. Pye*, 12 Pet. 258; *Poor v. Hazleton*, 15 N. H. 564; *Nimmo v. Davis*, 7 Tex. 26; *Trull v. Eastman*, 3 Met. 121; *Davidson v. Little*, 22 Pa. St. 252.

CONSTRUCTIVE FRAUD.—*Generally.*—This arises when a fiduciary relation exists, on slight suspicion or presumption; *Atkins v. Withers*, 94 N. C. 581; *Post v. Martin*, 91 N. Y. 539; see *Huguenin v. Baseley*, 2 W. & J. Lead. Cas. in Eq. 1156 and notes. If the beneficiary had competent independent advice, the transaction may stand; *Ashton v. Thompson*, 32 Minn. 25; fiduciary relation has an effect in case of values; *Cheney v. Gleason*, 125 Mass. 166; where party could not read deed, and thought it was different; *Rider v. Kelso*, 53 Ia. 367.

Attorney and client.—Transactions between them are voidable; *Post v. Mason*, 91 N. Y. 539; *Yeamans v. James*, 27 Kan. 195; attorney may purchase from his client; *Stout v. Smith*, 98 N. Y. 25; *Alwood v. Mansfield*, 59 Ill. 496; and if client suffers no damage the courts will not interfere; *Kisling v. Shaw*, 33 Cal. 425; but attorney may not purchase at judicial sales; *Gibbons v. Hoag*, 95 Ill. 45; *Ryan v. Ashton*, 42 Ia. 365; *Byers v. Surget*, 19 How. 303; attorney may receive a gratuity; *Whipple v. Barton*, 63 N. H. 613; *Shipman v. Furniss*, 69 Ala. 555; the burden of showing the fairness of the transaction is on the attorney; *Evans v. Ellis*, 5 Denio, 640; *Brock v. Barnes*, 40 Barb. 521; *Greenfield's Est.* 2 Harris, 489; *Howell v. Ransom*, 11 Paige, 538; attorney deposited collection in own name, but not in his private account, no trust created; *Naltner v. Dolan*, 108 Ind. 500.

Principal and agent.—Burden of proving fairness of transaction between them is on the agent; *Farmer v. Farmer*, 89 N. J. Eq. 211; see *Porter v. Woodruff*, 36 N. J. Eq. 174; *Cheney v. Gleason*, 125 Mass. 166; *Hunter v. Hunter*, 50 Mo. 445; agent must act in utmost good faith; *Murray v. Beard*, 102 N. Y. 505; cannot charge for his services if interested; *Durgin v. Somers*, 117 Mass. 55; *Smith v. Townsend*, 109 Mass. 500; *Rice v. Wood*, 113 Mass. 133; *Stewart v. Duffy*, 16 Ill. 147; unless there is a special agreement; *Stewart v. Mather*, 32 Wis. 344; agent may become a trustee; *Cowperthwaite v. Bank*, 102 Pa. St. 397; fiduciary relation alone is not enough to compel an agent to transfer to his principal; *Collins v. Sullivan*, 135 Mass. 461; *Parsons v. Phelan*, 134 Mass. 109; but otherwise if he use his knowledge against his employer; *Ringo v. Binns*, 10 Pet. 279; *Peabody v. Norfolk*, 98 Mass. 452; see also

devised the lease to a trustee for an infant, and the trustee applied for a renewal on behalf of the infant, which was refused, on the ground that there could be no distress of the profits of a market, but the remedy must rest singly in covenant, of

Geddes' App. 80 Pa. St. 442; *Pomeroy v. Benton*, 77 Mo. 64; *Sweet v. Morrison*, 103 N. Y. 235.

Trustee and cestui que trust. — A transaction between them is voidable; *Gilman v. Kelly*, 77 Ill. 426; *Kitchen v. St. Louis R. R. Co.* 69 Mo. 224; it must be evidently fair; *Jones v. Lloyd*, 117 Ill. 597; *Baker v. Springfield Co.* 86 Mo. 75; trustee may purchase; *Spencer's App.* 80 Pa. St. 317; trustee may make a loan; *Wingate v. Harrison*, 59 Ind. 520; *Bent v. Priest*, 86 Mo. 475; cannot speculate with the estate; *Landis v. Saxton*, 89 Mo. 375; see *Parker v. Nickerson*, 112 Mass. 195; *McNeil v. Gates*, 41 Ark. 264; disability may be absolute; *Creveling v. Fritts*, 84 N. J. Eq. 134; *Freeman v. Harwood*, 49 Me. 195; not necessary to set transactions aside, because of the fiduciary relation; *Brown v. Cowell*, 116 Mass. 461; *Perry on Trusts*, § 195; *cestui que trust* may treat sale as a nullity; *Brothers v. Brothers*, 7 Ired. Eq. 150; burden of proving fairness is on the trustee; *Miles v. Wheeler*, 48 Ill. 124; objection to sale must be made within a reasonable time, if at all; *Mason v. Martin*, 4 Md. 124; *Marsh v. Whitmore*, 21 Wall. 178; the same principles apply in case of trustee purchasing through another; *Gaston v. Dashiell*, 55 Tex. 508; but if trustee did not intend to purchase, when sold to another, his purchase will stand; *Stephen v. Beall*, 22 Wall. 329; see *Lehmann v. Rothbarth*, 111 Ill. 185; directors and officers of a corporation cannot receive benefits not shared by others; *Union Pacific R. R. Co. v. Credit Mobilier*, 135 Mass. 367; *Lyman v. Bonney*, 101 Mass. 562; *Twin Lick Co. v. Marbury*, 91 U. S. 587; *Thomas v. Brownville R. R. Co.* 109 U. S. 522; trustee cannot purchase at a judicial sale; *Roberts v. Moseley*, 64 Mo. 507; *Baker v. Springfield R. R. Co.* 80 Mo. 75; if a trustee get a new lease that is merely a graft on the old one and enures to the trust estate; *Gower v. Andrew*, 59 Cal. 119; *Davis v. Hamlin*, 108 Ill. 39.

Guardian and ward. — Transactions between them are voidable; *Taylor v. Brown*, 55 Mich. 482; *Meek v. Perry*, 36 Miss. 190; *Hunter v. Lawrence*, 11 Gratt. 111; guardian must account for all profits; *Kepler v. Davis*, 80 Pa. St. 153; even after the relation is terminated, any dealings between them will be carefully scrutinized; *Harris v. Carstarphen*, 69 N. C. 416; *Smith v. Davis*, 49 Md. 470; *Manson v. Felton*, 13 Pick. 206.

Executors and administrators. — Same principles apply as in cases already considered; *Humphreys v. Burleson*, 72 Ala. 1; *Newhall v. Jones*, 117 Mass. 252; cannot buy through another; *Morgan v. Wattles*, 69 Ind. 260; *McGaughey v. Brown*, 46 Ark. 25; transactions are voidable; *Ives v. Ashley*, 97 Mass. 198; *White v. Moss*, 67 Ga. 89; *Jones v. Graham*, 36 Ark. 383; may purchase of another; *Boehlert v. McBride*, 48 Mo. 505.

So mortgagee exercising power of sale is bound to act in good faith; *Thompson v. Heywood*, 129 Mass. 401; *Burr v. Borden*, 61 Ill. 389; *Hood v. Adams*, 124 Mass. 481.

Husband and wife. — A voluntary conveyance between them may be set aside; *Boyd v. de la Montagnie*, 78 N. Y. 498; *Walker v. Coleman*, 81 Ill. 390; *Haydock v. Haydock*, 34 N. J. Eq. 570; *Stone v. Wood*, 85 Ill. 603.

Parent and child. — Transaction between them must be fair; *Miskey's App.* 107 Pa. St. 611; *Wood v. Rabe*, 96 N. Y. 414; so in case of one standing in

which an infant was incapable. Upon this the trustee [*181] took a lease * for the benefit of himself; but Lord King said, "I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would

loco parentis; Williams v. Williams, 63 Md. 371; Million v. Taylor, 38 Ark. 428; likewise of gift to parent; Roberts v. Barker, 63 N. H. 332; Wright v. Vanderplank, 2 Kay and J. 1; see Bradshaw v. Yates, 67 Mo. 221; as to blood relatives generally, see Prince v. Prince, 67 Ala. 565; Robins v. Hope, 57 Cal. 498; Lett v. Emmett, 37 N. J. Eq. 535; White v. Smith, 51 Ala. 405; Bradley v. Fuller, 118 Mass. 239. As to co-tenants, see Mathews v. Bliss, 22 Pick. 48; Morse v. Bassett, 132 Mass. 602.

Weak-minded persons. — Stout v. Smith, 98 N. Y. 25; but see Reed v. Peterson, 91 Ill. 288; Selden v. Myers, 20 How. 506; reading papers of which they do not get the purport; Trambly v. Ricard, 130 Mass. 259; Mullen v. Old Colony R. R. Co. 127 Mass. 86; if they sell at inadequate price, there is a presumption against the sale; Moore v. Moore, 56 Cal. 89; Storrs v. Scougale, 48 Ala. 387; gift; Davis v. Dean, 66 Wis. 100; fairness in transaction; Rogers v. Higgins, 56 Ill. 244; Galpin v. Wilson, 40 Ia. 90. Equity will also relieve in case of drunkenness and duress; Barrett v. Buxton, 2 Ark. 167; Belcher v. Belcher, 10 Yerg. 121; Phillips v. Moore, 11 Mo. 600; Calloway v. Witherspoon, 5 Ired. Eq. 128.

The Statute of Frauds. — This statute will not interfere with the proof of fraud, either actual or constructive, otherwise it would aid that which it is intended to prevent; Ryan v. Dox, 34 N. Y. 307; and generally it will not exclude proof of trusts growing out of the acts rather than the agreements of parties; Campbell v. Dearborn, 109 Mass. 130, where the question is considered and the authorities reviewed at length; Ferguson v. Haas, 64 N. C. 772; Judd v. Mosely, 30 Ia. 428; Squire's App. 70 Pa. St. 268; where a deed has been fraudulently obtained which is different in its import and effect from what was intended by all the parties thereto, equity will grant relief; Russell v. Southard, 12 How. 139; Phillips v. Phillips, 50 Mo. 603; Jenkins v. Eldredge, 3 Story, 181; Sprigg v. Bank, 14 Pet. 201; Hughes v. Edwards, 9 Wheat. 489; Babcock v. Wyman, 19 How. 289; Flagg v. Mann, 14 Pick. 467; Browne v. Dewey, 1 Sandf. Ch. 56; Conway v. Alexander, 7 Cranch, 218; Eaton v. Green, 22 Pick. 526; the bill must contain a plain case of fraud; Gouverneur v. Elmendorf, 5 Johns. Ch. 79; Forsyth v. Clark, 3 Wend. 637; Kennedy v. Kennedy, 2 Ala. 571; and parol is admissible to prove it, even though it alters or destroys a written instrument; Barrell v. Hanrick, 42 Ala. 60; Miller v. Cotten, 5 Ga. 346; Christ v. Diefenbach, 1 Serg. & R. 464; likewise if, through mistake or accident, an instrument does not show the real intention of the parties; Peterson v. Grover, 20 Me. 363; Hunt v. Rousmanier, 8 Wheat. 174; Blanchard v. Moore, 4 J. J. Marsh. 471; Gower v. Sterner, 2 Whart. 75; but if through negligence, or ignorance of law, a deed is incomplete it cannot be reformed if the defendant claims that it covers all that was originally intended; Dwight v. Pomroy, 17 Mass. 303; Wheaton v. Wheaton, 9 Conn. 96; Chamness v. Crutchfield, 2 Ired. Eq. 148; Garwood v. Eldridge, 1 Green. Ch. 146; and parol evidence must be clear, satisfactory, and uncontradicted; Collier v. Collier, 30 Ind. 32; Lingenfelter v. Richey, 62 Pa. St. 128; notes to Woollam v. Hearne, 2 Lead. Cas. Eq. 684; see previous note to resulting trusts, in reference to parol. The right of the original owner where there has been fraud in the conveyance is an equitable interest which he can dispose

be renewed to *cestui que use*. This may seem hard, that the trustee is the only person of all mankind who might not have the lease, but it is very proper that the rule should be strictly pursued, and not in the least relaxed." And so he decreed the lease to be assigned to the infant.

3. **Rule applicable to tenant for life, &c.**—Upon the same principle, if a person, possessing only a partial interest in a

of; *County v. Herrington*, 50 Ill. 232; *McKissick v. Pickle*, 4 Harris, 140; and the same is true of the purchase at a sale, tainted with fraud; *Kent v. Mahaffey*, 10 Ohio St. 204; *Clapper v. House*, 6 Paige, 149; *Morgan v. Halford*, 1 Sm. & Gif. 101; *Cogswell v. Cogswell*, 2 Edw. Ch. 231.

Illustrations of constructive trust.—A. is the equitable owner of land. B., C., and D. agree to purchase for the benefit of A.'s children, B. taking the title, holds in trust for the children; *Wright v. Gay*, 101 Ill. 233; the vendor retained the title to land, but assigned the notes given for the unpaid purchase-money, a trust for the assignee; *Felton v. Smith*, 84 Ind. 485; testator devised land to his wife, remainder to his children, and she turning it into money reinvested it in property which she held in trust for the children; *Clifford v. Farmer*, 79 Ind. 529; the manager of a bank owed it money, he having taken the funds to buy land, which he gave to his wife, she held subject to its payment; *Statesville Bank v. Simonton*, 86 N. C. 187; A. and wife convey to B. for no consideration, it being understood that he will reconvey to the wife, for whom he holds in trust; *Cox v. Arnsmann*, 76 Ind. 210; trustee mingles another's money with his own, and buys land, a trust in the money which follows it; *Houghton v. Davenport*, 74 Me. 590; the mere refusal to perform an agreement is not sufficient; *Tatge v. Tatge*, 34 Minn. 272; though the language in a will makes an absolute gift, yet if other expressions show a qualified gift, a court of equity will look at the intent, and raise a constructive trust; *Lucas v. Lockhart*, 10 Smedes & M. 466; 48 Am. Dec. 766.

A person may become a trustee *ex maleficio*, as where one agrees not to bid against the other at a sale, the purchaser is a trustee *ex maleficio*; *Cowperthwaite v. Carbondale Bank*, 102 Pa. St. 397; *Regan v. Campbell*, 2 Mackey, (D. C.) 28; or where one obtains property by fraud, no fiduciary relations being necessary; *Christy v. Sill*, 95 Pa. St. 380; or where parties fraudulently represented assets of a corporation as belonging to them, and, getting a dividend declared, held the assets, which they retained as trustees *ex maleficio* for the *bona fide* stockholders; *Bailey's App.* 96 Pa. St. 253.

Lapse of time.—A constructive trust will be barred by long acquiescence; but it is difficult to say as to the length of time; *Kane v. Bloodgood*, 7 Johns. Ch. 93; *Elmendorf v. Taylor*, 10 Wheat. 168; *Miller v. McIntire*, 6 Pet. 61; *Sherwood v. Sutton*, 5 Mason, 143; *Paschall v. Hinderer*, 28 Ohio St. 568; twenty years has been held sufficient to bar any relief in some cases; *Norris's App.* 71 Pa. St. 124; *Perry v. Craig*, 3 Mo. 360; *Field v. Wilson*, 6 B. Mon. 479; *McDowell v. Goldsmith*, 2 Md. Ch. 370; and so has thirty; *Phillips v. Belden*, 2 Edw. Ch. 1; *Harrod v. Fountleroy*, 3 J. J. Marsh. 548; and thirty-eight; *Powell v. Murray*, 10 Paige, 266; and forty-six; *Maxwell v. Kennedy*, 8 How. 210; and fifty; *Anderson v. Burwell*, 6 Gratt. 405; and twenty-seven; *Hayes v. Goode*, 7 Leigh, 486; and seventeen; *Hite v. Hite*, 1 B. Mon. 177. In other cases relief was not barred by a delay of twelve years; *Newman v. Early*, 3 Tenn. Ch. 714; *Butler v. Haskell*, 4 Des. 651; of eleven; *Rhinlander v. Barrow*,

lease, as a tenant for life (*a*), though with an absolute power of appointment, but which he does not exercise (*b*), a mortgagee (*c*), devisee subject to debts and legacies (*d*), or to an annuity (*e*), a joint tenant (*f*), or partner (*g*), renew the term upon his own account, he shall hold for the benefit of all parties interested in the old lease; for in consideration of equity the subject of the settlement is not only the lease, but also the right of renewal; and no person taking only a limited interest can avail himself of the situation in which the settlement has placed him to obtain a disproportionate advantage in derogation of the rights of others who have similar claims.

[So where a lessee had assigned the original lease by way of settlement and subsequently, without disclosing the settlement, took a new lease for a longer term in consideration of (in addition to a money payment) the surrender of the lease which was erroneously stated to be vested in him, the renewed lease was held to be bound by the settlement (*h*).]

(*a*) *Eyre v. Dolphin*, 2 B. & B. 290; *Rawe v. Chichester*, Amb. 715; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Pickering v. Vowles*, 1 B. C. C. 197; *Taster v. Marriott*, Amb. 668; *Owen v. Williams*, id. 734; *James v. Dean*, 11 Ves. 383; S. C. 15 Ves. 236; *Kempton v. Packman*, cited 7 Ves. 176; *Giddings v. Giddings*, 3 Russ. 241; *Nesbitt v. Tredennick*, 1 B. & B. 46, *per* Lord Manners; *Crop v. Norton*, 9 Mod. 233; *Buckley v. Lanauze*, Ll. & G. Rep. t. Plunket, 327; *Tanner v. Elworthy*, 4 Beav. 487; *Waters v. Bailey*, 2 Y. & C. C. C. 218; *Yem v. Edwards*, 3 K. & J. 564; 1 De G. & J. 598; *Stratton v. Murphy*, 1 Ir. Rep. Eq. 345. And see *Hill v. Hill*, 8 I. R. Eq. 140, 622; In the matter of *P. Dane*, 5 Ir. Eq. 498; [*Re Lord Ranelagh's Will*, 26 Ch. D. 590.]

(*b*) *Brookman v. Hales*, 2 V. & B. 45.

(*c*) *Rushworth's case*, Freem. 13; *Nesbitt v. Tredennick*, 1 B. & B. 46, *per* Lord Manners.

(*d*) *Jackson v. Welsh*, Ll. & G. Rep. t. Plunket, 346.

(*e*) *Winslow v. Tighe*, 2 B. & B. 195; *Stubbs v. Roth*, id. 548; and see *Webb v. Lugar*, 2 Y. & C. 247; *Jones v. Kearney*, 1 Conn. & Laws, 34.

(*f*) *Palmer v. Young*, 1 Vern. 276.

(*g*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Ex parte Grace*, 1 Bos. & Pul. 376; *Clegg v. Fishwick*, 1 Mac. & G. 294; *Clegg v. Edmondson*, 8 De G. M. & G. 787.

(*h*) *Re Lulham*, 53 L. J. N. S. Ch. 928; 32 W. R. 1013; affirmed 33 W. R. 788.]

17 Johns. 538; of eighteen; *Bell v. Webb*, 2 Gill. 168; it seems that the time would depend upon the circumstances of the case; *Michoud v. Girod*, 4 How. 561; *Boone v. Chiles*, 10 Pet. 177. See *post* Statute of Limitations and note.

4. **Even to a yearly tenant.** — Even where a testator was possessed of leaseholds, and devised all his interest therein to A. for life, remainder to B., and the lease having expired in the testator's lifetime, he was at his * death [*182] a mere yearly tenant, it was held that A. having renewed the lease, must hold it upon the limitations of the will, for the yearly tenancy was an interest capable of transmission by devise; and the tenant for life could not, by acting on the good-will that accompanied the possession, get the exclusive benefit of a more durable term (a).

[So if the legal personal representative of a tenant from year to year of lands in Ireland, procure by reason of any tenant right custom, a renewal of the tenancy or a regrant to himself, he will take the lands impressed with a trust for the benefit of the estate of the deceased tenant (b).]

5. **Case of tenant at will, or at sufferance.** — But if a testator be merely *tenant at will*, or *at sufferance*, then, if the executor renew, he is not a trustee for the devisees, for as there was no interest upon which the will could operate, there was in fact no devise (c). And so, where a testator possessed leaseholds for years and was in possession of other lands without title under the mistaken impression that they were contained in the lease, and devised the lands he held upon lease to A., his executrix, for life, with remainder over, and A. obtained a lease of the lands not passed by the will, it was ruled that no trust attached upon the term in favour of the remainderman (d). But although the *devisees* cannot claim in these cases, the executor himself will not be allowed to keep the beneficial interest; but it will be an accretion to the general estate (e).

6. **Agent of trustee cannot renew for his own benefit.** — Neither can an agent (f), or other person acting under the

(a) *James v. Dean*, 11 Ves. 383; S. C. 15 Ves. 236; *Re Tottenham*, 16 Ir. Ch. Rep. 118.

[(b) *M'Cracken v. M'Clelland*, 11 I. R. Eq. 172; *Kelly v. Kelly*, 8 I. R. Eq. 403.]

(c) See *James v. Dean*, 11 Ves. 391, 392.

(d) *Rawe v. Chichester*, Amb. 715.

(e) *James v. Dean*, 11 Ves. 392, per Lord Eldon. In *Rawe v. Chichester*, *ubi supra*, the executrix was also residuary legatee.

(f) *Griffin v. Griffin*, 1 Sch. & Lef. 353; and see *Edwards v. Lewis*,

authority of a trustee, executor, or tenant for life, renew for his own benefit (*g*).

7. **Trustee may not sell the right of renewal.**—And if, instead of taking a renewal himself, the trustee, executor, or tenant for life, dispose of the right of renewal for a valuable consideration, the purchase-money will be subjected in equity to the trusts of the settlement; for if a person cannot appropriate the renewal to himself, the Court will not suffer him to sell for his own benefit (*h*).

8. **What particular circumstances will not vary the general rule.**—In the preceding cases the rule of equity [*183] will still hold good, * though the lease had not customarily been renewed (*a*), or the period of the old lease had actually expired (*b*), or the renewal was for a different term, or at a different rent (*c*), or, instead of a chattel lease, was for lives (*d*), or other lands were demised not comprised in the original lease (*e*), or the landlord refused to renew to the *cestui que trust* (*f*), or the co-trustees refused to concur in a renewal for the *cestui que trust's* benefit (*g*), or the lessee having purchased the immediate reversion, being a term of years, took the renewal from the superior landlord (*h*).

9. **Nesbitt v. Tredennick.**—But where a lessee of lands in Ireland charged a lease with a jointure, and then *mortgaged* it to Newcomen and again to Nesbitt, and afterwards the rent falling in arrear, the landlord recovered possession upon ejectment, and the lessee allowed six months (the period of redemption by the lessee fixed by the statute) to pass with-

3 Atk. 538; *Mulvany v. Dillon*, 1 B. & B. 417.

(*g*) *Edwards v. Lewis*, 3 Atk. 538.

(*h*) *Owen v. Williams*, Amb. 734.

(*a*) See *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Mulvany v. Dillon*, 1 B. & B. 409; *Eyre v. Dolphin*, 2 B. & B. 290; *Killick v. Flexney*, 4 B. C. C. 161.

(*b*) *Edwards v. Lewis*, 3 Atk. 538, *per* Lord Hardwicke.

(*c*) *Mulvany v. Dillon*, 1 B. & B. 409; *James v. Dean*, 7 Ves. 883; S. C. 15 Ves. 236, &c.

(*d*) *Eyre v. Dolphin*, 2 B. & B. 299.

(*e*) *Giddings v. Giddings*, 3 Russ. 241; [*Re Morgan*, 18 Ch. D. 93.] But the lease of the additional lands will not be a graft, *Acheson v. Fair*, 2 Conn. & Laws. 208.

(*f*) *Keech v. Sandford*, Sel. Ch. Ca. 61; *Griffin v. Griffin*, 1 Sch. & Lef. 353.

(*g*) *Blewett v. Millett*, 7 B. P. C. 367.

(*h*) *Giddings v. Giddings*, 3 Russ. 241.

out tendering the rent, fines and costs, and Nesbitt (who as mortgagee, had three months longer to redeem under the statute), sent notice to the lessee that he would not redeem, but that if the lessee himself did *not* proceed, he should make the best bargain he could with the landlord, and then offered to take a new lease, to commence from the expiration of three months, with a proviso, that if any other of the parties interested should make a lodgment before that time, the agreement should be void, Lord Manners said that in all the previous cases the party had obtained the renewal by being in possession, or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease, and there was either a remnant of the old lease, or a tenant-right of renewal, on which the new lease could be ingrafted; but that here no part of Nesbitt's conduct showed a contrivance, nor was he in possession, and all that Nesbitt treated for was a new lease, giving, however, full opportunity to the lessee to dispose of his interest, or to renew, if he was enabled to do so. And under these circumstances his Lordship held that the lease granted to the mortgagee was not bound by any trust for the mortgagor (i).

* 10. **Trustee's lien for expenses of renewal.**—A [*184] trustee or executor who has renewed a lease has a lien upon the estate for the costs and expenses of the renewal, with interest (a); and where lands are taken under the new lease that were not comprised in the original lease, the Court will apportion the expenses according to the value of the respective lands (b). The trustee will also be allowed for money subsequently laid out in lasting improvements (c), though made during the suit for recovering the lease (d).

11. **Expenses incurred by tenant for life.**—In the case of a renewal by tenant for life, if he put in his own life, he of

(i) *Nesbitt v. Tredennick*, 1 B. & B. 29. *Kempton v. Packman*, cited 7 Ves. 176.

(a) *Holt v. Holt*, 1 Ch. Ca. 190; *Rawe v. Chichester*, Amb. 715, see 241. (b) *Giddings v. Giddings*, 3 Russ.

720; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Lawrence v. Maggs*, 1 Eden, 463; *Pickering v. Vowles*, 1 B. C. C. 197; *James v. Dean*, 11 Ves. 388; (c) *Holt v. Holt*, 1 Ch. Ca. 190; *Lawrence v. Maggs*, 1 Eden, 463; *Stratton v. Murphy*, 1 Ir. Rep. Eq. 361. (d) *Walley v. Walley*, 1 Vern. 184.

course can have no claim to reimbursement (*e*), but if he put in the life of another, the expenses will be apportioned at the death of the tenant for life, according to the time of his actual enjoyment of the renewed interest (*f*); and his estate will be a creditor on the premises for the apportionment though the remaindermen be his own children, who resist the claim on the ground of advancement (*g*).

12. **Contribution to fine by annuitants.**— In the case of a testator devising all his interest in leaseholds subject to an *annuity*, the question of the annuitant's contribution has been differently regarded by different judges. In *Maxwell v. Ashe* (*h*), the case of a *will*, Sir John Strange decided that the annuitant was *not* bound to contribute; and in *Moody v. Matthews* (*i*), where a feme *sold* an annuity to A. for his life, out of tithes held by her upon lease, and covenanted to pay the annuity, and that the tithes should continue subject to it during the life of A., and the feme married and died, and the husband, who took the term by survivorship, renewed at his own expense, Sir W. Grant determined that the annuitant was not to be called upon to contribute, for that would be to make him pay the consideration twice, and he said the case of *Maxwell v. Ashe* was decisive. On the other hand, it was ruled by Lord Manners, in the case of a *will*, that the annuitant must contribute in proportion to his interest in the property: for though the testator had given no direction upon this point, it was incident to this sort of tenure (*j*). At the time of this decision, his Lordship [*185] was not aware of the *cases before Sir J. Strange and Sir W. Grant; but on a subsequent occasion, when the same point again arose before him, he adhered to the same opinion, notwithstanding those authorities, for “all the legatees,” he said, “appear to have been equally the objects of the testator's favour. Could it have been his intention that one of them alone should bear the expense of the

(*e*) *Lawrence v. Maggs*, 1 Eden, 458.

(*f*) See *infra*.

(*g*) *Lawrence v. Maggs*, 1 Eden, 458.

(*h*) Cited 7 Ves. 184.

(*i*) 7 Ves. 174; and see *Jones v.*

Kearney, 1 Conn. & Laws. 47; *Thomas v. Burne*, 1 Dru. & Walsh, 657.

(*j*) *Winslow v. Tighe*, 2 B. & B. 195.

renewal, and that the others should receive the full amount of their annuities without any deduction?" (a)

13. **Terms of assignment by the trustee.**—In making the assignment to the *cestui que trust* the trustee will also be indemnified against the personal covenants which he entered into with the lessor (b); and on his own part must clear the lease of all incumbrances created by himself, except underleases at rack-rent (c).

14. **Accounting for mesne rents and profits.**—The trustee must also account to the *cestui que trust* for the *mesne* rents and profits which he has received from the estate (d), and also for any sub-fines that may have been paid to him by underlessees (e). And the *cestui que trust*, though the lease which was the ground of his equity has since actually expired, may still call for an account of the rents and profits (f). In the case of a renewal by tenant for life, the account will of course be restricted to the period since the tenant for life's decease (g).

15. **Remedy against purchasers and others claiming under the lessee.**—The *cestui que trust* may pursue his remedy not only against the original trustee, executor, or tenant for life, and volunteers claiming through them (h); but also against a purchaser, with notice express or implied of the plaintiff's title (i); and a purchaser will be deemed to have had notice if the lease assigned to him recited the surrender of a former lease, which recited the surrender of a previous lease, in which mention was made of the settlement under which the *cestui que trust* claims (j); and the volunteer or purchaser with notice

(a) *Stubbs v. Roth*, 2 B. & B. 548.

(b) *Giddings v. Giddings*, 3 Russ. 241; *Keech v. Sandford*, Sel. Ch. Ca. 61.

(c) *Bowles v. Stewart*, 1 Sch. & Lef. 209, see 230.

(d) *Giddings v. Giddings*, *Keech v. Sanford*, *ubi supra*; *Mulvany v. Dillon*, 1 B. & B. 409; *Walley v. Walley*, 1 Vern. 484; *Luckin v. Rushworth*, Finch. 392; *Blewett v. Millett*, 7 B. P. C. 367.

(e) *Rawe v. Chichester*, Amb. 715, see 720.

(f) *Eyre v. Dolphin*, 2 B. & B. 290.

(g) *James v. Dean*, 11 Ves. 383, see 396; *Giddings v. Giddings*, 3 Russ. 241.

(h) *Bowles v. Stewart*, 1 Sch. & Lef. 209; *Eyre v. Dolphin*, 2 B. & B. 290; *Blewett v. Millett*, 7 B. P. C. 367.

(i) *Coppin v. Fernyhough*, 2 B. C. C. 291; *Walley v. Walley*, 1 Vern. 484; *Eyre v. Dolphin*, 2 B. & B. 290; *Stratton v. Murphy*, 1 Ir. Rep. Eq. 345.

(j) *Coppin v. Fernyhough*, 2 B. C. C. 291; *Hodgkinson v. Cooper*, 9 Beav. 304.

will not be helped by a fine levied (*k*), or even by a [*186] release from the *cestui que trust*, if executed * by him while in ignorance of the facts of the case (*a*). However, a purchaser will stand in the place of his assignor in respect of any allowances for expenses incurred in the renewal (*b*).

16. *Limitation of time*. — A *cestui que trust* will be barred of his remedy if he be guilty of long *acquiescence*, as, in one case, for a period of fifteen years (*c*); and in another case concerning a lease of mines (which stand on a peculiar footing,) relief was refused after a period of nine years (*d*), and continual claim by the *cestui que trust*, if without any effective step to enforce the right, will be of no avail (*e*).

17. *Case of trustee of a lease purchasing the reversion*. — If the trustee of a lease become the *purchaser of the reversion* Sir W. Grant said, that, as he thereby intercepts and cuts off the chance of future renewals, and consequently makes use of his situation to prejudice the interests of those who stand behind him, there might be some sort of equity in a claim to have the reversion considered as a substitution for those interests, but his Honour was not aware of any determination to that effect (*f*). [However it has recently been held in a case in Ireland that a trustee of leaseholds customarily renewable, who purchased the reversion at a sale by auction was a constructive trustee for the persons beneficially interested in the leaseholds (*g*); and in another recent case where the assignee of the tenant for life of leaseholds which had been customarily renewable, but which the Ecclesiastical Commissioners had refused to renew any more, purchased the reversion, it was held that he had become a trustee of the reversion for the benefit of the persons

(*k*) *Bowles v. Stewart*, 1 Sch. & Lef. 209.

(*a*) *Bowles v. Stewart*, 1 Sch. & Lef. 209.

(*b*) *Coppin v. Fernyhough*, 2 B. C. C. 291.

(*c*) *Isald v. Fitzgerald*, cited *Owen v. Williams*, Amb. 735, 737; and see *Norris v. Le Neve*, 3 Atk. 38; *Jackson v. Welsh*, Ll. & G. Rep. t. Plunket, 346.

(*d*) *Clegg v. Edmondson*, 8 De G. M. & G. 787.

(*e*) *Clegg v. Edmondson*, 8 De G. M. & G. 787.

(*f*) *Randall v. Russell*, 3 Mer. 197; and see *Hardman v. Johnson*, ib. 347; *Norris v. Le Neve*, 3 Atk. 37 and 38; *Lesley's case*, 2 Freem. 52; *Fosbroke v. Balguy*, 1 M. & K. 226; *Giddings v. Giddings*, 3 Russ. 241.

(*g*) *Gabbett v. Lawder*, 11 L. R.

interested in the lease subject to his right to be recouped the purchase-money paid by him (*h*).

So where one of the trustees of a lucrative agency agreement procured the agency to be renewed to a firm, in which he was a partner, upon terms less lucrative but still beneficial, it was held that the trustee's interest in the renewed agreement formed part of the trust estate (*i*).]

*** No tenant-right where a corporation has sold to an** [*187] **individual.** — But where a lease had been held by a trustee of a college, and the corporation having disposed of the reversion to a stranger, the trustee purchased of the alienee, Sir W. Grant decided that the parties interested in the original lease had no equity against the trustee, for the tenant-right of renewal with a public body was gone, and the lease at a rack-rent was all that could be expected from a private proprietor (*a*).

But if the trustee of a lease with a covenant for perpetual renewal, or if any person standing in a fiduciary position in respect of such a lease acquires the legal possession of and dominion over the fee which is subject to the covenant, and so deals with the property as to make the renewal impossible by his own act and for his own benefit, he is bound to give full effect to the charges on the trust estate, and to satisfy those charges out of the acquired estate (*b*).

18. Factor, agent, &c., constructive trustees. — The principle upon which a Court of equity elicits constructive trusts might be pursued into numerous other instances; as if a factor (*c*), agent (*d*), partner (*e*), inspector under a creditor's deed (*f*), or other confidential person, acquire any pecuniary advantage

Ir. 296; but see the observations of L. J. James in *Trumper v. Trumper*, 8 L. R. Ch. App. 879.]

[*(h)* *Re Lord Ranelagh's Will*, 26 Ch. D. 590; *Phillips v. Phillips*, 29 Ch. D. 673; and see *Leigh v. Burnett*, 29 Ch. D. 231.]

[*(i)* *Bennett v. The Gaslight and Coke Company*, 52 L. J. N. S. Ch. 98.]

(*a*) *Randall v. Russell*, 3 Mer. 190.

(*b*) *Trumper v. Trumper*, 14 L. R. Eq. 295, see p. 310; affirmed 8 L. R. Ch. App. 870.

(*c*) *East India Company v. Henchman*, 1 Ves. jun. 287; S. C. 8 B. P. C. 85.

(*d*) *Fawcett v. Whitehouse*, 1 R. & M. 132; *Hichens v. Congreve*, Ib. 150; *Carter v. Horne*, 1 Eq. Ca. Ab. 7; *Brookman v. Rothschild*, 3 Sim. 153; *Gillett v. Peppercorn*, 3 Beav. 78.

(*e*) *Bentley v. Craven*, 18 Beav. 75; *Burton v. Wookey*, 6 Mad. 368.

(*f*) *Coppard v. Allen*, 4 Giff. 497; 2 De G. J. & S. 173.

to himself through the medium of his fiduciary character, he is accountable as a constructive trustee for those profits to his employer or other person whose interest he was bound to advance.

19. **Unauthorized fall of timber.**—Again, a constructive trust may arise under special instances in respect of waste. If a tenant for life commit *legal* waste by felling timber, the tenant of the first estate of *inheritance* at the time (though there be an intermediate life estate [and though there be a possibility of intermediate estates of inheritance coming into *esse* (g)]) can recover the trees or damages (h), for even an intermediate tenant for life, though he be unimpeachable [*188] able of waste, * cannot claim the timber against the owner of the inheritance (a); and if the tenant for life commit *equitable* waste, the rule is the same, and the timber belongs to the owner of the first estate of inheritance, notwithstanding intermediate estates for life (b); and the wrongdoer is accountable for the proceeds, with interest at 4 per cent (c), without being allowed for repairs (d); but subject to the bar of the statute of limitations which begins to run from the time of the waste (e). It may happen, however, that the *wrongdoer is himself, at the time, the owner of the first estate of inheritance*, while intermediate estates of inheritance may arise in future; as in a limitation to A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail,

[(g) *Cavendish v. Mundy*, W. N. 1877, p. 198; *Simpson v. Simpson*, 3 L. R. Ir. 308.]

[(h) Formerly a court of law was the proper tribunal in which to sue for a recovery of the trees or for damages, and relief was given in equity only when the plaintiff asked for an account or injunction, *Gent v. Harrison*, Johns. 517; *Higginbotham v. Hawkins*, 7 L. R. Ch. App. 676; *Whitfield v. Brewit*, 2 P. Wms. 240; *Lee v. Allston*, 1 B. C. C. 194; 3 B. C. C. 38; and see *Seagram v. Knight*, 3 L. R. Eq. 398; 2 L. R. Ch. App. 628. But now by 36 & 37 Vict. c. 60, s. 24, the jurisdictions of Courts of Law and Equity have been assimilated.]

(a) See *Gent v. Harrison*, Johns. 517.

(b) *Rolt v. Somerville*, 3 Eq. C. Ab. 759; *Ormonde v. Kynersley*, 5 Mad. 389; 2 S. & S. 15; *Butler v. Kynnersley*, 2 Bligh, N. S. 385; 7 L. J. O. S. 150; *Lushington v. Boldero*, 15 Beav. 1; *Duke of Leeds v. Amherst*, 2 Ph. 117; *Honywood v. Honwood*, 18 L. R. Eq. 306.

(c) *Garth v. Cotton*, 3 Atk. 751.

(d) *Whitfield v. Bewit*, 2 P. Wms. 240.

(e) *Seagram v. Knight*, 3 L. R. Eq. 398; 2 L. R. Ch. App. 628; [*Simpson v. Simpson*, 3 L. R. Ir. 308;] and see *Higginbotham v. Hawkins*, 7 L. R. Ch. App. 676.

remainder to A. in fee, and no issue of A. or B. are born at the time of commission of the waste. In this case, as no man shall take advantage of his own wrong, and there is no estate of inheritance in *esse* except that of A. himself, he is *constructively a trustee* in equity of the proceeds of the timber for the benefit of all the persons interested under the settlement, except himself, according to their respective estates, that is, he is made to account for the proceeds which are invested and deemed part of the settlement, and the income of such investment is payable to the tenant in *præ-senti*, not being the wrongdoer, whether such tenant be for life or otherwise, and if there be no such tenant it accumulates. But if in the case put there be no issue afterwards born of A. or B., and therefore there is no inheritance but that of A., the fund subject to B.'s life estate will belong to A. (f). In the above case, *A. himself [*189] had the first vested estate of inheritance; but it may

(f) *Williams v. Bolton*, 1 Cox, 72; *Powlett v. Bolton*, 3 Ves. 374; see further statement of this case in 2 New Rep. 306. But in *Garth v. Cotton*, 3 Atk. 751; 1 Ves. sen. 523, 546, interest at 4 per cent was given only from the filing of the bill; and in *Duke of Leeds v. Amherst*, 12 Sim. 476; 2 Ph. 117, interest at 4 per cent was given only from the death of the wrongdoer. In the later case of *Bagot v. Bagot*, 32 Beav. 509, M. R. refused interest further back than from the death of the wrongdoer. The decision was appealed from to L. C. (Lord Westbury), and the case was compromised, but in the course of the argument L. C. intimated his concurrence with the view of M. R. as to the time whence interest was to be computed. The L. C. seemed also to think that, as to such timber felled by the tenant for life as the Court upon application to it would have ordered to be cut, the tenant for life would be protected as having done a proper act, but that the onus would lie upon him to establish such a case. "As regards the question of interest

on the money arising from timber properly cut, the plaintiff," he said, "could hardly ask for interest. Of course the obligation of making out the case lies upon the tenant for life." — *M.S.* However this may be as to the timber *properly* cut, the remark suggests itself as to the timber *improperly* cut, that if the tenant for life is not to pay interest from the time of felling, he takes advantage of his own wrong, for if the timber had been left standing the increase of growth would have enured to the benefit of the remainderman, but by cutting the timber the tenant for life intercepts this accretion and enjoys the *usufruct* himself. True he loses the mast and shade, but that is the result of his own wilful act, and he cannot therefore complain. As regards mines, the case is different, for here there is no continuing growth for the benefit of the remainderman. But in one respect the offence of waste is greater, for if timber be cut other timber may grow in its place, but when minerals are abstracted the vacuum remains for ever. On the

happen that the first vested estate of inheritance is in B., and that A. and B. collude together in cutting the timber, and then a court of equity equally interferes and makes A. and B. accountable as constructive trustees of the proceeds for the benefit of the other persons interested in the estate, including tenants for life (a). Where there is collusion between the tenant for life and the owner of the first estate of inheritance, or where the tenant for life is also owner of the first estate of inheritance, and the timber is improperly cut, the remedy of the next tenant for life in remainder, is said to be barred by the statute after six years from the death of the prior tenant for life (b).

Mines. — 36 & 37 Vict. c. 66, s. 25. — These principles which have been laid down as * to timber apply also *mutatis mutandis* to waste in opening mines (a).

subject of timber generally, see the work of the late Mr. Craig, Q. C.

(a) *Garth v. Cotton*, 3 Atk. 751.

(b) *Birch-Wolfe v. Birch*, 9 L. R. Eq. 683. Where the timber is *properly* cut, either by order of the Court or by a wise exercise of the discretion of the trustees, the proceeds are treated as part of the settlement, and are invested for the benefit of all persons interested, whether tenants for life or otherwise, and whether impeachable for waste or not, according to their respective estates. *Waldo v. Waldo*, 12 Sim. 107; *Wickham v. Wickham*, 19 Ves. 419; *Gent v. Harrison*, Johns. 517; *Mildmay v. Mildmay*, 4 B. C. C. 76; *Delapole v. Delapole*, 17 Ves. 150; *Tooker v. Annesley*, 5 Sim. 235; *Consett v. Bell*, 1 Y. & C. C. C. 569; *Honywood v. Honywood*, 18 L. R. Eq. 306. And if there be a tenant for life unimpeachable of waste, whose estate comes into possession, as he might have cut the timber, he is held to be entitled absolutely to the fund; *Waldo v. Waldo*, 12 Sim. 107; *Phillips v. Barlow*, 14 Sim. 262; *Gent v. Harrison*, Johns. 517; [*Lowndes v. Norton*, 6 Ch. D. 139. And an equitable tenant for life unimpeachable for waste is enti-

tled to the proceeds of ornamental timber cut by him where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber; but it does not follow that the Court will not at the instance of the remainderman grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary to cut, and direct that the cutting be done under its supervision; *Baker v. Sebright*, 13 Ch. D. 179.] *Windfalls* belong to the owner of the first estate of inheritance, except such trees as the tenant for life would have been entitled to cut as *thinnings, etc.*, and these belong to the tenant for life, *Bateman v. Hotchkin* (No. 2), 31 Beav. 486; [and see *Re Ainslie*, 28 Ch. D. 89; *Re Harrison*, 54 L. J. N. S. Ch. 26, where the proceeds of larch plantations which had been blown down were applied in renewing the plantations and the balance was invested and the income directed to be paid to the tenant for life; varied on appeal, 28 Ch. D. 220.]

(a) See *Bagot v. Bagot*, 32 Beav. 509.

By a recent Act 36 & 37 Vict. c. 66, s. 25, subs. 3, "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life, any *legal* right to commit waste of the description known as *equitable waste*, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

[20. By the Settled Land Act, 1882, a tenant for life though impeachable for waste may with the consent of the trustees of the settlement or an order of the Court cut timber ripe and fit for cutting, and is entitled to one fourth of the net proceeds (*b*), and the same Act gives the tenant for life power to lease unopened mines, setting aside a portion of the profits for the benefit of the remaindermen (*c*).]

21. **Bonus for not opposing a bill in Parliament.**—As another instance of a constructive trust, where money is paid to a tenant for life in consideration of his not opposing a bill in parliament for sanctioning a railway, he is constructively a trustee of the money for all the persons interested under the settlement (*d*).

[22. **Salmon fishings.**—Again, where a grant had been made by the Crown to the Aberdeen Town Council of salmon-fishings in the sea opposite certain lands which in the view of the Court were held by the Town Council in trust for the Aberdeen University and its professors, it was held that the grant of the fishings having been made to the Town Council as the proprietors of the lands, they were constructive trustees of the fishings for the University and its professors (*e*).

23. **Mortgagee.**—A mortgagee is not a constructive trustee for the mortgagor of his power of sale, which is a power given to him for his own benefit, to enable him the better to realize his debt (*f*).]

24. **Mortgagee in possession.**—A mortgagee in *possession* is constructively a trustee of the rents and profits, and bound

[*b*) 45 & 46 Vict. c. 38, s. 35.]

[*c*) Sects. 6, 11.]

[*d*) Pole v. Pole, 2 Dr. & Sm. 420;

[Earl of Shrewsbury v. North Staffordshire Railway Company, 1 L. R. Eq. 608.]

[*e*) Aberdeen Town Council v.

Aberdeen University, 2 App. Cas.

544.]

[*f*) Warner v. Jacob, 20 Ch. D.

220.]

to apply them in a due course of administration (*g*), and it has been held (*h*) that a mortgagee in possession is so [*191] strictly a trustee, that he is liable even after a * transfer for the rents and profits subsequently accrued, but the case was probably decided upon its own special circumstances, for a mortgagee has surely a right to transfer his mortgage without notice to the mortgagor, though in the latter case he may not be allowed the costs of the transfer (*a*), and, if he be entitled to transfer, how can he be held responsible as for a breach of trust (*b*)?

25. **Fraud in attorney.**— Again, where A. contracted for the sale of *part* of his estate, and the purchaser requiring a fine to be levied, B., who was A.'s attorney, and also his heir-apparent, advised a fine to be levied of the *whole* estate, whereby the will of the vendor was revoked, and the part not included in the sale descended to B. as his heir-at-law, it was held that the devisee under the will could call upon B. as a constructive trustee (*c*). "You," said Lord Eldon, "who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have been entitled to it if you had known what as an attorney you ought to have known, and, not knowing it, you shall not take advantage of your own ignorance" (*d*).

(*g*) *Coppring v. Cooke*, 1 Vern. 270; *Bentham v. Haincourt*, Pr. Ch. 30; *Parker v. Calcroft*, 6 Mad. 11; *Hughes v. Williams*, 12 Ves. 493; *Maddocks v. Wren*, 2 Ch. Rep. 109.

(*h*) *Venables v. Foyle*, 1 Ch. Ca. 3.

(*a*) *Re Radcliffe*, 22 Beav. 201.

(*b*) See *Kingham v. Lee*, 15 Sim.

400. [It is singular that there is no modern case upon this point, but the liability of the mortgagee may perhaps be supported on the ground that by entering into possession he has made himself a trustee for the mortgagor of the rents and profits, and that the transfer without the consent

of the mortgagor merely constitutes the transferee to be the agent of the mortgagee for the receipt of the rents and profits, and leaves the mortgagee liable for the acts of his agent; and see Coote on Mortgages, 5th ed., 720, 809; Fisher on Mortgages, 4th ed., 854.]

(*c*) *Bulkley v. Wilford*, 2 Cl. & Fin. 177; *S. C.* 8 Bligh, N. S. 111; and see *Segrave v. Kirwan*, Beat. 157; *Nanney v. Williams*, 22 Beav. 452; [*Keough v. M'Grath*, 5 L. R. Ir. 478; *Lysaght v. M'Grath*, 11 L. R. Ir. 142; *Re Birchall*, 44 L. T. N. S. 243.]

(*d*) 2 Cl. & Fin. 177.

26. **Agent not constructive trustee.**—An *agent* employed by a trustee is accountable in general to his principal only, and cannot as a *constructive trustee* be made responsible to the *cestuis que trust* (e); [and the directors of a company bound by a trust will not be personally liable for breaches of trust committed by the company (f).] But of course the rule does *not apply where the agent has taken an [*192] actively *fraudulent* part, and so made himself a principal (a).

27. **Title-deeds.**—Under the head of constructive trusts may be mentioned the case of a settlement left in the hands of a person taking only a partial benefit under it as a tenant for life, in which case the other persons interested and claiming under the same title have a right to the fair use of the document, and the holder is deemed a trustee for them, and is bound to produce it at their request (b). And in one case it was ruled that if a person sell part of his estate and retain the title-deeds, though he may not have given a covenant for production, he is compellable to produce them as common property to the purchaser (c). But in *Barclay v. Raine* (d), Sir J. Leach seems to have doubted whether, if part be sold and the title-deeds delivered to the *purchaser*, a future purchaser from him could be ordered, where there was no

(e) *Keane v. Roberts*, 4 Mad. 332; see 356, 359; *Davis v. Spurling*, 1 R. & M. 54; S. C. Taml. 199; *Crisp v. Spranger*, Nels. 109; *Saville v. Tancred*, 3 Sw. 141, note; *Nickolson v. Knowles*, 5 Mad. 47; *Myler v. Fitzpatrick*, 6 Mad. 360; *Fyler v. Fyler*, 3 Beav. 550; *Maw v. Pearson*, 28 Beav. 196; *Lockwood v. Abdy*, 14 Sim. 437; *Archer v. Lavender*, 9 I. R. Eq. 225, *per cur.*; [*Wilson v. Lord Bury*, 5 Q. B. D. 518; *Re Spencer*, 51 L. J. N. S. Ch. 271;] and see *Ex parte Burton*, 3 Mont. D. & De G. 364; *Re Bunting*, 2 Ad. & Ell. 467; *Williams v. Williams*, 17 Ch. D. 437, where attention is drawn to the distinction between notice to raise a constructive trust, and notice to an actual trustee. [(f) *Wilson v. Lord Bury*, 5 Q. B. D. 518.]

(a) *Hardy v. Caley*, 33 Beav. 365; *Fyler v. Fyler*, 3 Beav. 550; *Portlock v. Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont. D. & De G. 399; *Attorney-General v. Corporation of Leicester*, 7 Beav. 176; *Bodenham v. Hoskyns*, 2 De G. M. & G. 903; *Pannell v. Hurley*, 2 Coll. 241; *Alleyne v. Darcy*, 4 Ir. Ch. Rep. 199; and see S. C. 5 Ir. Ch. Rep. 56; *Bridgman v. Gill*, 24 Beav. 382; *Archer v. Lavender*, 9 I. R. Eq. 220.

(b) *Banbury v. Briscoe*, 2 Ch. Ca. 42; *Harrison v. Coppard*, 2 Cox, 318; *Shore v. Collett*, Coop. 234; *Davis v. Dysart*, 20 Beav. 405; *Curnick v. Tucker*, 17 L. R. Eq. 320.

(c) *Fain v. Ayers*, 2 S. & S. 533.

(d) 1 S. & S. 449; see 7 Byth. by Jarm. 375.

covenant for that purpose, to produce them to the owners of the other parts. The real property commissioners, however, observe, that previously to this case it had been supposed, either that an original independent equity existed entitling any party interested in a deed to call for its production by any other person having the custody of it, or *at least* that such an equity existed wherever the parties requiring the production claimed under a person who had *taken the precaution to procure a covenant for that purpose*, and the person having the actual custody of it derived that custody from or through a person who had entered into such covenant (*e*); upon which Lord St. Leonards observes, that the rule in equity was never so universal as it is quoted in the first part of the above statement, but that the second branch, stating what *at least* the doctrine was, appears to be correct (*f*). It is submitted that even where a vendor has taken no such covenant from the purchaser, the vendor, and those claiming under him, would have a right to production of the deeds as common property.

28. **Constructive trustees from notice of the trust.**—Constructive trusts are said also to arise where the trust estate is converted by the trustee from one species of [*193] property into *another; and again, where the trust estate passes from the trustee into the hands of a volunteer whether with or without notice, or of a purchaser for valuable consideration with notice; but as these are cases rather of an existing trust continued and kept on foot than of a new trust created, the consideration of these topics will be reserved to a subsequent part of the treatise.

In concluding the subject of trusts by *operation of law*, it may be proper to offer a few remarks on the wording of the Statute of Frauds (*a*).

Statute of Frauds as affecting trusts by operation of law.—By the eighth section it is enacted, that “where any convey-

(*e*) 3d Rep.

(*f*) Vend. & Purch. 14th ed. 454, note (1).

(*a*) 29 Car. 2, c. 3.

ance shall be made of any lands or tenements by which a trust or confidence shall or may *arise or result by the implication or construction of law*, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if that statute had not been made; anything thereinbefore contained to the contrary notwithstanding."

Lord Hardwicke's opinion. — Lord Hardwicke upon this clause observed, "I am now bound down by the Statute of Frauds to construe nothing a resulting trust but what are there called trusts by operation of law; and what are those? Why, First, when an estate is purchased in the name of one person but the money or consideration is given by another; or, Secondly, where a trust is declared only as to part, and nothing said as to the rest, in which case what remains undisposed of will result to the heir-at-law. I do not know any other instance besides these two, where the Court has declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *mala fide*" (b).

Mr. Fonblanque's opinion. — Upon this opinion of Lord Hardwicke, Mr. Fonblanque has made the following just remarks: — "This construction of the clause of the Statute of Frauds restrains it to such trusts as arise by *operation of law*, whereas it clearly extends to such as are raised by *construction of Courts of equity*; as, in the case of an executor or guardian renewing a lease, though with his own money, such renewal shall be deemed to be in trust for the person beneficially interested in the old lease. It is also observable, that the first instance stated by his Lordship of a resulting trust is not so qualified as to let in the exceptions to which the general rule is subject, and the second instance is only applicable to a *will*, whereas the doctrine of resulting trusts is also applicable to **conveyances*" (a). As [*194] to the latter part of this criticism it may be observed that while Atkyns makes Lord Hardwicke speak of a *will*

(b) Lloyd v. Spillet, 2 Atk. 150.

(a) 2 Tr. Eq. 116, note (a).

only, Barnardiston, the other reporter, applies his Lordship's observation to a *conveyance* (b). It would thus appear that Lord Hardwicke in fact extended his remark to a will and a conveyance indifferently.

Both Lord Hardwicke and Mr. Fonblanque assume that the *seventh* or enacting clause embraces all trusts indiscriminately, and that such as arise by operation of law are only saved from the act by virtue of the subsequent exception contained in the eighth section; but the language of the latter clause, that "where any *conveyance* shall be made of any lands or tenements by which a trust or confidence shall or may arise or result," &c., seems to have escaped observation; for, unless *conveyance* be taken with great violence to the meaning of the words to include a *devise*, it is clear that trusts resulting under a will are not reached by the terms of saving. Nor is it easy to suppose that the legislature could mean to include a devise; for the fifth and sixth sections relate exclusively to devices, and, had it fallen within the scope of the Act to extend the eighth section to wills, it can scarcely be conceived that the proper and technical word should not necessarily have suggested itself. The question then arises, If resulting trusts upon a *will* are not saved by the exception, how are they not affected by force of the previous enactment? As the statute was directed against frauds and perjuries, it is obvious that resulting trusts were not within the mischief intended to be remedied. The aim of the legislature was, not to disturb such trusts as were raised by maxims of equity, and so could not open a door to fraud or perjury, but, by requiring the *creation of trusts by parties* to be manifested in writing, to prevent that fraud and perjury to which the admission of parol testimony had hitherto given occasion. And the enactment itself is applicable only to this view of the subject; for the legislature could scarcely direct that "all declarations or creations of trusts should be manifested and proved," &c., unless the trusts were in their nature capable of manifestation and proof; but, as resulting trusts are the effect of a rule of law,

(b) See *Lloyd v. Spillet*, Barn. 388.

to prove them would be to instruct the Court in its own principles, to certify to the judge how equity itself operates. The exception could only have been inserted *ex majori cautela* that the extent of the enactment might not be left to implication. But why, it will be asked, are resulting trusts upon *conveyances* excepted, and not resulting * trusts [*195] upon *wills*? The only explanation that suggests itself is this: — The statute had spoken only of *declarations* or *creations* of trusts, and by a will no resulting trust is or can be *declared* or *created*. If lands be devised to A. and his heirs upon trust to pay the testator's debts, the resulting trust of the surplus is no new declaration or creation; the right construction is, that the testator has disposed of the legal estate to the devisee, and of part of the equitable in favour of creditors; but the residue of the equitable, though said to result, has in fact never been parted with, but descends upon the heir-at-law as part of the original inheritance. In *conveyances*, however, this is not equally the case; for if a purchase be taken in the name of a third person, a trust which had no previous existence arises upon the property in favour of the real purchaser; and so if a lease be renewed by a trustee, the equity which was annexed to the old term immediately fastens upon the new. Here, then, it is evident there is an actual *creation* of trust; and, to obviate all doubts as to the operation of the enactment, resulting trusts arising out of *conveyances* are expressly excepted.

THE TRUSTEE.

CHAPTER XI.

OF DISCLAIMER AND ACCEPTANCE OF THE TRUST.

HAVING treated of the creation of trusts, whether by the act of a party or by operation of law, we shall next direct our attention to the *estate* and *office* of the *trustee*, and, as a preliminary inquiry, we propose in the present chapter to offer a few remarks upon the subject of the trustee's disclaimer or acceptance of the trust.

*First. Of Disclaimer.*¹

1. **No person compellable to be a trustee.**—It may be laid down as a clear and undisputed rule, that no one is *compellable* to undertake a trust (*a*). “Though a person,” said

(*a*) *Robinson v. Pett*, 3 P. W. 251, *Lowry v. Fulton*, 9 Sim. 123, *per* Sir *Lord Talbot*; *Moyle v. Moyle*, *L. Shadwell*.
2 R. & M. 715, *per* *Lord Brougham*;

¹ *Disclaimer.*—The trustee named may refuse to act even though it should prevent the beneficiary from receiving any of the benefit which the trustee intended for him; *Beekman v. Bonsor*, 23 N. Y. 298; such a refusal will not destroy the trust, as the court will appoint another trustee; *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311; *Thatcher v. Church*, 37 Mich. 264; *Johnson v. Roland*, 58 Tenn. 203; *Nicoll v. Miller*, 37 Ill. 387; declining to act as an executor is not a disclaimer of a trust declared in a will; *Tainter v. Clark*, 13 Met. 224; *William v. Cushing*, 34 Me. 370; *Garner v. Dowling*, 11 Heisk. 48; *Anderson v. Earle*, 9 S. C. 460; this refusal may be in writing, or such a tacit refusal as would make plain the intention to disclaim; *Read v. Robinson*, 6 Watts. & S. 331; for there is a presumption of acceptance until the contrary appears; *Furman v. Fisher*, 4 Cold. 626; *Penny v. Davis*, 3 B. Mon. 313; especially if there is a long lapse of time; *Eyrick v. Hetrick*, 13 Pa. St. 493; a parol disclaimer is sufficient, even of a trust of real estate. *Roseboom v. Mosher*, 2 Denio, 61; *Hamilton v. Love*, 2 Kerr. (N. B.) 243; *Thompsons v. Meek*, 7 Leigh. 419; but it must be certain and complete;

Lord Redesdale, "may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede, except so far as his feelings may forbid it; and it will be proper for him to do so, if he finds that his charge as executor is different from what he conceived it to be when he entered into the engagement" (*b*).

2. *Heir of a trustee.*— But there does not appear to be any instance in which, after acceptance by the trustee, his *heir* has been allowed to disclaim the *estate*; and if the law permitted it, many instances would no doubt have occurred (*c*). The inconveniences of such a right of disclaimer would [before the recent Act (*d*) have been] great,

(*b*) *Doyle v. Blake*, 2 Sch. & Lef. 289.

(*c*) See *Humphrey v. Morse*, 2 Atk. 408.

[(*d*) 44 & 45 Vict. c. 41, s. 30,

under which the legal estate in realty devolves to the personal representative of the trustee as if it were a chattel real.]

Judson v. Gibbons, 5 Wend. 224; it may be a sufficient disclaimer if the trustees named fail to perform any of the duties required in the management of the trust estate, or to qualify as such trustees; *Williams v. King*, 43 Conn. 572; *Wardwell v. McDowell*, 31 Ill. 364; *Thornton v. Winston*, 4 Leigh. 152; *Marr v. Peay*, 2 Murph. 85; or they may disclaim in court or by pleadings; *Clemens v. Clemens*, 60 Barb. 366.

If the trustee has accepted the trust, he cannot afterwards free himself from it by putting in a disclaimer; *Shepherd v. M'Evers*, 4 Johns. Ch. 136; 8 Am. Dec. 561; *Armstrong v. Morrill*, 14 Wall. 138; *Sears v. Dillingham*, 12 Mass. 358; *Strong v. Willis*, 3 Fla. 124; *Jones v. Stockett*, 2 Bland. 409; *Cruger v. Halliday*, 11 Paige, 314; *Drane v. Gunter*, 19 Ala. 731; *Chaplin v. Givens*, 1 Rice, Eq. 133; but see *Robertson v. McGeoch*, 11 Paige, 640; he can be discharged only by a decree of court, by the consent of all interested parties, or in accordance with provision made in the instrument declaring the trust; *Sugden v. Crossland*, 3 Sm. & Gif. 192; *Webster v. Vandeverter*, 6 Gray, 428; *Perkins v. McGavock*, 3 Hayn. 265; *Ridgeley v. Johnson*, 11 Barb. 527; *Diefendorf v. Spraker*, 10 N. Y. 246; *Re Bernstein*, 3 Redf. 20; mere abandonment will not relieve the trustee of his responsibility; *Thatcher v. Candee*, 3 Keyes, 157; *Cruger v. Halliday*, 11 Paige, 314; if a person dies without accepting or disclaiming, whether his heirs or representatives can disclaim is an unsettled question; *Goodson v. Ellison*, 8 Russ. 583; *Hill on Trustees*, 222; *King v. Phillips*, 16 Jur. 1080.

Effect of disclaimer.— If a trustee disclaim he loses any gifts or benefits attaching to the position; *Kirkland v. Narramore*, 105 Mass. 31; *Newcomb v. Williams*, 9 Met. 525; *Hall v. Cushing*, 9 Pick. 395; *Barrus v. Kirkland*, 8 Gray, 512; *Billingslea v. Moore*, 14 Ga. 370; *King v. Woodhull*, 3 Edw. Ch. 79; *Thayer v. Wellington*, 9 Allen, 283. If there is a complete disclaimer, the result is the same as if the appointment of the trustee had not been made; *Leggett v. Hunter*, 19 N. Y. 445; *Clemens v. Clemens*, 60 Barb. 366; if one of several disclaim, the whole estate is held by the others, *Ellis v. Boston*, H. &

[*197] as the * legal estate would then [have] become vested in the Crown. However, where the heir took not strictly in that character, but as special occupant, he might have exercised his discretion in refusing or accepting the estate (*a*).

3. **Disclaimer should be without delay.**—If the party named as trustee intend to decline the administration of the trust, he ought to execute a disclaimer without delay. There is no rule, however, that a trustee must execute a disclaimer within any particular time. Thus it will operate after an interval of sixteen years, if the interval can be so explained as to rebut the presumption of his having accepted the trust (*b*). If a person know of the trust and lie by for a long period, it is for a jury, or the Court sitting as a jury, to say whether such acquiescence was not because he had assented to the office (*c*).

4. **Form of the disclaimer.**—The disclaimer should be by deed, for a deed is clear evidence and admits of no ambiguity (*d*); and the instrument should be a *disclaimer* and not a *conveyance*, for the latter, as it transmits the estate, has been held to imply a previous acceptance of the office (*e*); for a person cannot be allowed to disclaim the office and accept the estate (*f*). However Lord Eldon expressed his opinion, which seems the common sense view, that where the intention is disclaimer, the instrument ought to receive that construction, though it be a conveyance in form (*g*).

(*a*) *Creagh v. Blood*, 3 Jones & Lat. 170. and see *Urch v. Walker*, 3 M. & C. 702.

(*b*) *Doe v. Harris*, 16 M. & W. 517; and see *Noble v. Meymott*, 14 Beav. 471. (*f*) *Re Martinez' Trusts*; 22 L. T. N. S. 403.

(*c*) See *Doe v. Harris*, 16 M. & W. 522; *Paddon v. Richardson*, 7 De G. M. & G. 563; *James v. Frearson*, 1 Y. & C. C. C. 370. (*g*) *Nicloson v. Wordsworth*, 2 Sw. 372. In *Attorney-General v. Doyley*, 2 Eq. Ca. Ab. 194, the trustee who declined to act was directed to convey, and the same decree was made in

(*d*) *Stacey v. Elph*, 1 M. & K. 199, *Hussey v. Markham*, Rep. t. Finch, 258. In *Sharp v. Sharp*, 2 B. & A. 405, it was held the trustees had not

(*e*) *Crewe v. Dicken*, 4 Ves. 97;

E. R. R. Co. 107 Mass. 1; if all renounce, the estate rests in the heirs or representatives; *Dunning v. Ocean Bank*, 6 Laus. 296; but if a part disclaim, it must be known so as to determine upon the validity of the acts of the others; *Moir v. Brown*, 14 Barb. 39.

5. Can a person accept a bounty and repudiate a trust under the same will? — If a person be nominated a trustee in a will and also take a benefit under it, he can claim the testator's bounty, and yet disclaim the *onus* of the trust (*h*); for an executor, who is also a legatee, may renounce probate and yet claim the legacy, and it is difficult to point out a distinction between the two cases. But if the benefit be *annexed to the office* of trustee or executor, and he does not act, he cannot claim the benefit (*i*).

* 6. *Opinion of counsel as to disclaimer.* — If one be [*198] named as trustee without any authority from himself, he is justified (as between himself and the parties interested in the trust who require a disclaimer from him and thereby undertake to pay all proper costs,) in taking the opinion of counsel upon the propriety of executing a deed of disclaimer (*a*).

7. *Disclaimer of trust by statement of defence.* — A trust may be disclaimed at the bar of the Court (*b*), or by [a statement of defence,] and the person named as trustee will, like any other person made a party to the suit unnecessarily, be entitled to his costs (*c*); (but only as between party and party (*d*);) though the action which might have been dismissed against him at an earlier stage be brought to a hearing (*e*); and if his [statement] be needlessly long, he will only be allowed what would have been the reasonable costs of a simple disclaimer (*f*).

8. *May be shown by acts.* — A trust may also be repudiated on the evidence of conduct without any express declaration

acted, though they had *conveyed* the estate instead of disclaiming. See *Urch v. Walker*, 3 M. & C. 702; *Richardson v. Hulbert*, 1 Anst. 65.

(*h*) See *Talbot v. Radnor*, 3 M. & K. 254; *Pollexfen v. Moore*, 3 Atk. 272; *Andrew v. Trinity Hall*, Camb. 9 Ves. 525; *Warren v. Rudall*, 1 J. & H. 1.

(*i*) *Slany v. Witney*, 2 L. R. Eq. 418; and see *Lewis v. Mathews*, 8 L. R. Eq. 277.

(*a*) *In re Tryon*, 7 Beav. 496.

(*b*) *Ladbroke v. Bleadon*, M. R. 16 Jur. 630; *Foster v. Dawber*, 8 W. R. 646; and see *Re Ellison's Trust*, 2 Jur. N. S. 62.

(*c*) *Hickson v. Fitzgerald*, 1 Moll. 14.

(*d*) *Norway v. Norway*, 2 M. & K. 278, overruling *Sherratt v. Bentley*, 1 R. & M. 655; see *Legg v. Mackrell*, 1 Giff. 166; *Bulkeley v. Earl of Eglington*, 1 Jur. N. S. 994.

(*e*) *Bray v. West*, 9 Sim. 429.

(*f*) *Martin v. Persse*, 1 Moll. 146; *Parsons v. Potter*, 2 Hog. 281.

of disclaimer (*g*); but a person would act very imprudently, who allowed so important a question as whether he is a trustee or not to remain matter of construction.

9. **After disclaimer, the trustee may act as agent to the trust.**—After renunciation of the trust, whether by express disclaimer, or by conduct which is tantamount to it, a trustee may assist as agent, or act under a letter of attorney, in the management of the estate without incurring responsibility (*h*); but the caution need scarcely be suggested, that all such interference cannot be too scrupulously avoided before the fact of the renunciation of the trust has been most unquestionably established; and where the person named as trustee is to receive a profit from his agency, this naturally excites a suspicion in the mind of the Court (*i*).

10. **How estate divested from the trustee.**—On a grant or other conveyance to a trustee, though upon onerous trusts, the estate passes to him without any express assent but subject to the right of dissenting (*j*), and what will amount to a disclaimer *at law*, so as to *divest the estate*, is a distinct question from the disclaimer of the *office* in equity.

Freeholds may be disclaimed by deed.—It was formerly held (at least such was the clear opinion of Lord [*199] *Coke), that a *freehold*, whether vested in a person by feoffment, grant (*a*), or devise (*b*), could not be disclaimed but by *matter of record*; and the reason upon which this maxim was founded, was that the suitor might be more certainly apprised who was the tenant to the *præcipe* (*c*). But the doctrine of modern times is, that disclaimer by mat-

(*g*) *Stacey v. Elph*, 1 M. & K. 195; *White v. M'Dermott*, 7 I. R. C. L. 1.

(*h*) *Dove v. Everard*, 1 R. & M. 231; *Harrison v. Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, 6th ed. note (*y*); *Stacey v. Elph*, 1 M. & K. 195; *Lowry v. Fulton*, 9 Sim. 104; *Montgomery v. Johnson*, 11 Ir. Eq. Rep. 480.

(*i*) *Montgomery v. Johnson*, 11 Ir. Eq. Rep. 481.

(*j*) *Siggers v. Evans*, 5 Ell. & Bl. 380.

(*a*) *Butler and Baker's case*, 3 Rep. 26 a, 27 a; *Anon. case*, 4 Leon. 207; *Shepp. Touch*. 285.

(*b*) *Bonifant v. Greenfield*, Godb. 79, *per* Lord Coke; but at the re-hearing (Cr. Eliz. 80) it was adjudged that three could pass the whole estate, the fourth having disclaimed by act *in pais*; and see *Shepp. Touch*. 452.

(*c*) *Butler and Baker's case*, 3 Rep. 26, b.

ter of record is unnecessary (*d*); for, as Lord Tenterden observed, there can be no disclaimer by a person in a court of record, unless some other person think fit to cite him there to receive his disclaimer, and if the estate be *damnosa hæreditas*, that is not very likely to happen (*e*). It has been lately held that the estate may be divested by the disclaimer of the trustee in chancery, though appearing only as a respondent upon a petition (*f*); and Mr. Justice Holroyd laid it down generally that a party might disclaim a freehold not only by deed but by parol (*g*); and the doctrine has since been sanctioned by actual decision (*h*).

11. *Disclaimer of uses*.—It was laid down in *Butler and Baker's case*, that estates limited under the statute of uses were to be disclaimed with the same formalities as estates at common law (*i*); but Lord Eldon doubted whether a party could disclaim in the case of a conveyance to uses, except by release with intent of disclaimer: however, his Lordship added, he was aware that such a doctrine would shake titles innumerable (*j*).

12. *Disclaimer of chattels*.—It seems to be clearly established, that a disclaimer by parol declaration, will suffice to divest the legal estate, where the trust property is a mere chattel interest (*k*).

13. *Disclaimer by feme covert*.—Whether a *feme covert* could, under the Fines and Recoveries Act, disclaim an interest in real estate, was, by the terms of the statute, left doubtful; the act enabling her only to “dispose of, release, surrender, or extinguish,” any estate or power as if she

(*d*) *Townson v. Tickell*, 3 B. & A. 31; *Begbie v. Crook*, 2 Bing. N. C. 70; S. C. 2 Scott, 128.

(*e*) *Townson v. Tickell*, 3 B. & A. 36.

(*f*) *Foster v. Dawber*, 8 W. R. 646; the trust estate comprised mortgages: but see *Re Ellison's Trust*, 2 Jur. N. S. 62.

(*g*) *Townson v. Tickell*, 3 B. & A. 38, citing *Bonifant v. Greenfield*, Cro. Eliz. 80; and see *Doe v. Smyth*, 6 B. & C. 112.

(*h*) *Bingham v. Clanmorris*, 2 Moll. 253. And see *Shepp. Touch.* 452; *Doe v. Smyth*, 6 B. & C. 112; *Doe v. Harris*, 16 M. & W. 517; but see *Re Ellison's Trust*, 2 Jur. N. S. 62.

(*i*) 3 Rep. 27, a.

(*j*) *Nicloson v. Wordsworth*, 2 Sw. 372.

(*k*) *Shepp. Touch.* 285; *Butler and Baker's case*, 3 Rep. 26, b, 27, a; *Smith v. Wheeler*, 1 Vent. 130; S. C. 2 Keb. 774; *Doe v. Harris*, 16 M. & W. 520, 521, per Parke, B.

[*200] *were a *feme sole* (a). In the Irish Act, 4 & 5 W. 4, c. 92, s. 68, the word "disclaim" was expressly introduced. And now, by 8 & 9 Vict. c. 106, s. 7, a married woman is enabled, in like manner, to "disclaim" any estate or interest in lands in England. But the disclaimer must be by deed, and the husband must concur, and the *feme covert* must make the statutory acknowledgement. [Whether under the Married Women's Property Act, 1882 (b), a married woman can disclaim, is also doubtful; and it will be prudent, in all cases coming within 8 & 9 Vict. c. 106, s. 7, to comply with the formalities required by that act.]

14. **Effect of disclaimer.**—The effect of disclaimer by a trustee, where there is a co-trustee, is to vest the whole *legal estate* in the co-trustee (c): and, as regards the exercise of the *office*, even if the trust be accompanied with a power, the continuing trustee may administer the trust without the concurrence of the trustee who has chosen to disclaim, and without the appointment of a new trustee (d). The settlor, it is said, must be presumed to know what the legal consequence of the death or disclaimer of one of the trustees would be (e). And when the disclaimer has been executed, it operates retrospectively, and makes the other trustee the sole trustee *ab initio* (f).

15. **Disclaimer of personal contracts.**—But in *personal contracts* the rule is different, for where A. covenants with B., C., and D. as trustees, and B. disclaims, C. and D. do not take the joint covenant, and cannot sue without B. (g).

16. **Disclaimer of protectorship.**—If trustees are appointed *protectors* of the settlement, and they intend to disclaim the

(a) 3 & 4 W. 4, c. 74, s. 77.

[(b) 45 & 46 Vict. c. 75.]

(c) Bonifant v. Greenfield, Crow. Eliz. 80; Crewe v. Dicken, 4 Ves. 100, per Lord Loughborough; Small v. Marwood, 9 B. & C. 299; Freem. 13, case 111; Hawkins v. Kemp, 3 East, 410; Townson v. Tickle, 3 B. & Ald. 31; Browell v. Reed, 1 Hare, 435, per Sir J. Wigram; and see Nicolson v. Wordsworth, 2 Sw. 369.

(d) Adams v. Taunton, 5 Mad. 435; Cooke v. Crawford, 13 Sim. 96; Bayly v. Cumming, 10 Ir. Eq. Rep. 410; Hawkins v. Kemp, 3 East, 410; White v. M'Dermott, 7 I. R. C. L. 1.

(e) Browell v. Reed, 1 Hare, 435, per Sir J. Wigram.

(f) Peppercorn v. Wayman, 5 De G. & Sm. 230.

(g) Wetherell v. Langston, 1 Exch. 634.

protectorship, the deed of disclaimer must, by the Fines and Recoveries Act, be enrolled in Chancery (*h*).

*Secondly. Of Acceptance.*¹

1. **How trust accepted.**—A trustee may *accept* the office either by signing the trust deed (*i*), or by an express declaration of his assent (*j*), or by proceeding to act in the execution of the duties of the trust.

(*h*) 3 & 4 W. 4, c. 74, s. 32.

(*j*) See *Doe v. Harris*, 16 M. & W.

(*i*) See *Buckeridge v. Glasse*, 1 Cr. 517.

& Ph. 131, 134.

¹ *Acceptance.*—A common mode of acceptance is that of signing the trust; *Field v. Arrowsmith*, 3 Humph. 442; *Roberts v. Moseley*, 51 Mo. 284; *Bixler v. Taylor*, 3 B. Mon. 362; *Flint v. Clinton Co.* 12 N. H. 432; acting as trustee is a sufficient acceptance; *Redenour v. Wherritt*, 30 Ind. 485. No particular formality is required, but acts fairly implying a consent are sufficient and taking possession of the property is an act of this kind; *Scully v. Reeves*, 2 Green Ch. 84; 29 Am. Dec. 694. Parol evidence is admissible to prove the acceptance of the trust; *Pond v. Hine*, 21 Conn. 519; *Penny v. Davis*, 3 B. Mon. 314; *Crocker v. Lowenthal*, 83 Ill. 579; *Roberts v. Moseley*, 64 Mo. 507; *Hanson v. Worthington*, 12 Md. 418; *Redenour v. Wherritt*, 30 Ind. 485; every voluntary act relating to the trust indicates acceptance; *Lewis v. Baird*, 3 McLean, 56; unless some other reason for it appear; *Judson v. Gibbons*, 5 Wend. 224; *Carter v. Carter*, 10 B. Mon. 327; the bringing a suit as trustee is evidence of acceptance; *Taylor v. Atwood*, 47 Conn. 498; *O'Neill v. Henderson*, 15 Ark. 235; 60 Am. Dec. 568. At common law a trust under a will might be accepted and the trustee enter upon his duties before the will was allowed, but in most of the states there are statutes requiring the proof of the will in the proper Probate Court. If a person named as trustee in a will neglect to give bonds and qualify it has the effect of a disclaimer; *Deering v. Adams*, 37 Me. 265; *Luscomb v. Ballard*, 5 Gray, 403; *Sawyer's App.* 16 N. H. 459; *Gaskill v. Gaskill*, 7 R. I. 478; *Mitchell v. Rice*, 6 J. J. Marsh, 625; *Johnson's App.* 9 Barr. 416; but failure to give a bond may not take away the legal title; *Gardner v. Brown*, 21 Wall. 36. Where there are no controlling statutes, if the same one is named as executor and trustee, a proving of the will by him will be a sufficient acceptance; *Baldwin v. Porter*, 12 Conn. 473; *Hanson v. Worthington*, 12 Md. 418; that is where, in consequence of being an executor, he is to act as a trustee; *Knight v. Loomis*, 30 Me. 204; *De Peyster v. Clendinning*, 8 Paige, 295; *Wilson's Est.* 2 Pa. St. 325; *Williams v. Conrad*, 30 Barb. 524; yet if the offices are intended to be independent and distinct the same acceptance is required of the trustee; *Deering v. Adams*, 37 Me. 265; *Wheatley v. Badger*, 7 Pa. St. 459; *Worth v. M'Aden*, 1 Dev. & B. Eq. 209; *Judson v. Gibbons*, 5 Wend. 226. It may be necessary for the court to decide whether the executor is to be the trustee; *Carson v. Carson*, 6 Allen, 397; *Sawyer's App.* 16 N. H. 459; *Howard v. Peace Soc.* 49 Me. 286; *Wheeler v. Perry*, 18 N. H. 307; where no one is named as trustee, the executor is to act as such; *Pettingell v. Pettingell*, 60 Me. 412; *Richardson v. Knight*, 69 Me. 285. The bond of executor having other duties, as such executor will

[*201] *2. *Presumption of acceptance.*—Where a trustee, with *notice of his appointment* as trustee, has done nothing, but has not disclaimed, it will be presumed after a long lapse of time, as twenty years (*a*), and *à fortiori*, after thirty-four years (*b*), that he accepted the trust (*c*). And even where the deed was only four years old, Lord St. Leonards observed, “that where an estate was vested in trustees who *knew of their appointment* and did not object at the time, they would not be allowed afterwards to say they did not assent to the conveyance, and it would require some strong act to induce the Court to hold that in such a case the estate was divested. He spoke with respect to the

(*a*) *In re Uniacke*, 1 Jones & Lat. 1.

(*c*) But see *infra* as to renunciation

(*b*) *In re Needham*, 1 Jones & Lat.

of Probate.

34.

cover all his dealings with the estate; *Sheets' Est*, 52 Pa. St. 257; *Lansing v. Lansing*, 45 Barb. 182; *Towne v. Ammidown*, 20 Pick. 535; *State v. Nicols*, 10 Gill & J. 27; but not so, if the other duties are not performed because he is such executor; *Parsons v. Lyman*, 5 Blatchf. C. C. 170; *Maxtin v. Barnard*, 33 Ga. 520; *Perkins v. Lewis*, 41 Ala. 649.

After a lapse of twenty years it will be presumed that funds are held as trustee and not as executor; *Jennings v. Davis*, 5 Dana, 127; likewise where the executor has had his final account allowed; *State v. Hearst*, 12 Mo. 365. A person acting in both capacities does not hold as trustee until his account as executor has been filed and approved; *Elliott v. Sparrell*, 114 Mass. 404; *Prior v. Talbot*, 10 Cush. 1; *Hall v. Cushing*, 9 Pick. 395; but in some cases it has been held that acts showing a change in the manner of holding are sufficient; *State v. Brown*, 68 N. C. 554; *Perkins v. Moore*, 16 Ala. 9; *Conkey v. Dickinson*, 13 Met. 53; *Hubbard v. Lloyd*, 6 Cush. 522; *Ruffin v. Harrison*, 81 N. C. 208; it is insufficient for the executor merely to decide to hold certain property as trustee; *Miller v. Congdon*, 14 Gray, 114; if there is any loss the courts incline to make it a loss as trustee, rather than as executor; *Dorr v. Wainwright*, 13 Pick. 332; *Brown v. Kelsey*, 2 Cush. 248; a refusal to qualify as executor is not a refusal to act as trustee; *Pomroy v. Lewis*, 14 R. I. 349; *Hitchcock v. U. S. Bank*, 7 Ala. 386.

The executor is to administer the trusts which his testator held at his decease; *Nichols v. Campbell*, 10 Gratt. 561; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Maudlin v. Armistead*, 14 Ala. 702; he cannot accept those created by his testator and disclaim those with which the testator was charged; *King v. Lawrence*, 14 Wis. 238; *Mitchell v. Adams*, 1 Ired. Law. 298.

A trustee must accept the whole trust or none; *Van Horn v. Fonda*, 5 Johns. Ch. 403; *Latimer v. Hanson*, 1 Bland, 51; *Flint v. Clinton Co.* 12 N. H. 432; *Judice v. Provost*, 18 La. Ann. 601.

A trustee is responsible for what he does or neglects to do from the time of his acceptance, but not before; *Stevens v. Gaylord*, 11 Mass. 269; *Leland v. Felton*, 1 Allen, 531; *Ipswich Co. v. Story*, 5 Met. 310; *Prindle v. Holcomb*, 45 Conn. 111.

effect upon third parties, every Court and every jury would presume an assent" (*d*).

3. **Recitals.**—If the trustee execute the deed, he should see that the recitals are correct; or the Court may hold him liable for the consequences. However, in a late case (*e*), where it was recited in a marriage settlement that the lady was possessed of a sum of stock, which subsequently was not forthcoming, Lord Langdale said, there were so many instances of parties representing that they were entitled to particular property, which representation afterwards turned out to be wholly untrue, that it would be unjust and dangerous to bind third parties by such representations; and that he did not therefore accede to the argument, that the recital alone bound the trustees. And in another case where a release from the *cestuis que trust* to the trustees stated that the legacy duty amounted only to £19. 8s., whereas it was much more, Lord Romilly said it was a mistake of all parties, and that the trustees were not estopped by it in equity (*f*).

4. **Of acceptance by acting in the trust.**—What *acts* of a person nominated as trustee will amount to a *constructive* acceptance of the office, is a question constantly arising, and not easily to be determined by any general rule.

5. **Effect of probate.**—If a person named as executor takes out *probate* of the will, he thereby constitutes himself executor, and incurs all the liabilities annexed to the executorship (*g*). The *renunciation of probate* by a
*person named as executor and trustee is not in [*202]

(*d*) *Wise v. Wise*, 2 Jones & Lat. 403; see 412; and see *White v. M'Dermott*, 7 I. R. C. L. 1.

(*e*) *Fenwick v. Greenwell*, 10 Beav. 418. I have been informed by one of the counsel in the cause that in *Bliss v. Bridgewater*, at the Rolls, many years ago, Sir J. Leach held that trustees were bound by a recital that stock had been transferred into their names; and see *Gore v. Bowser*, 3 Sm. & G. 6; *Chaigneau v. Bryan*, 8 Ir. Ch. Rep. 251; *Story v. Gape*, 2 Jur. N. S.

706; *Westmoreland v. Holland*, 23 L. T. N. S. 797; 19 W. R. 302, affirmed W. N. 1871, p. 124.

(*f*) *Brooke v. Haynes*, 6 L. R. Eq. 25.

(*g*) *Booth v. Booth*, 1 Beav. 125; *Ward v. Butler*, 2 Moll. 533, per Lord Manners; *Styles v. Guy*, 1 Mac. & G. 431, per Lord Cottenham; *Scully v. Delany*, 2 Ir. Eq. Rep. 165. The case of *Balchen v. Scott*, 2 Ves. jun. 678, cannot be considered as law.

itself a *disclaimer* of the *trust*, but it is one circumstance of evidence, and if there be no proof of his ever having acted, the Court after a long lapse of time, as sixty years, will presume a disclaimer (a); [and where the trusts of the real and personal estate were combined, being trusts for sale and conversion, and application of the proceeds as a mixed fund in (*inter alia*) paying debts, legacies, and funeral expenses, and the same persons were appointed executors and trustees, and the only executor and trustee who survived the testator renounced probate, the late M.R. held that there was conclusive evidence of a disclaimer, as the trustee, after renouncing execution of the will as to the personal estate, could not carry out the trusts as to the payment of the debts and funeral and testamentary expenses, and could not get rid of a part of his trust in that way, but must have intended to disclaim all the trusts (b).]

6. **Executor of an executor.**—If an executor of an executor take upon himself the administration of the goods of the first testator, he thereby accepts the administration of the goods of the latter; for it is only through the medium of the latter testator that he can reach the executorship of the former. It was at one time thought that an executor might renounce probate of the will of the original testator, and at the same time or subsequently prove the will of the immediate testator (c), but the practice has now been settled to the contrary (d). But if the first executor never proved the will, the chain of representation is not continued (e).

7. **Voluntary interference with assets is acceptance of the executorship.**—Any *voluntary interference with the assets*, whether with or without probate, will stamp a person as acting executor. Thus, where of four executors only one

(a) *M'Kenna v. Eager*, 9 I. R. C. L. 79; and see *Earl Granville v. McNeile*, 7 Hare, 156, cited *post* with remarks.

[(b) *Roberts v. Gordon*, 6 Ch. D. 531.]

(c) *Shepp. Touch.* by Preston, 464; *Wankford v. Wankford*, Freem. 520;

Hayton v. Wolfe, Cro. Jac. 614; S. C. Palmer, 156; Hutton, 30.

(d) In the Goods of Perry, 2 Curt. 655; *Brooke v. Haynes*, 6 L. R. Eq. 25; In the Goods of Delacour, 9 I. R. Eq. 86; In the Goods of Griffin, 2 I. R. Eq. 320; and see In the Goods of Beer, 15 Jur. 160.

(e) 21 & 22 Vict. c. 95, s. 16.

proved, and the other three, describing themselves as *executors*, gave a letter of attorney to the fourth, describing him as *acting executor*, to receive a quantity of stock, Lord Hardwicke ruled that the whole number, by this conduct, had drawn upon themselves the burden of the executorship (*f*); and so generally, if an executor sign a power of attorney * to get in part of the testator's estate (*a*), he [*203] brings down the whole burden upon himself, though at the time of acting he disclaim the intention of assuming the office (*b*).

Acts of acceptance.—The joining in an assignment of the testator's lease (*c*), or the bringing an action on the footing of the trust (*d*), is an acceptance of the office. And an executor and trustee for sale will be deemed to have acted in the trust, if the property be expressed to be sold by direction of the trustees, and he is present, and takes part, and exercises authority or ownership by giving orders respecting the sale, and afterwards calls on a co-executor to inquire into the state of the testator's accounts (*e*).

8. Interference not acceptance, where clearly referable to another ground than acceptance.—The rule that every vol-

(*f*) *Harrison v. Graham*, 3 Hill's MSS. 239; S. C. cited *Churchill v. Lady Hobson*, 1 P. W. 241, note (*y*), 6th ed.; *White v. Barton*, 18 Beav. 192; *Carberry & Daly v. Cody*, 1 Ir. Rep. Eq. 76.

(*a*) *Cummins v. Cummins*, 8 Ir. Eq. Rep. 723.

(*b*) *Doyle v. Blake*, 2 Sch. & Lef. 231; but see *Malzy v. Edge*, 2 Jur. N. S. 80.

(*c*) *Urch v. Walker*, 3 M. & Cr. 702.

(*d*) *Montfort v. Cadogan*, 17 Ves. 489.

(*e*) *James v. Frearson*, 1 Y. & C. C. 370; see 376, 377. In *Orr v. Newton*, 2 Cox, 274, A., one of six executors, admitted in his answer that during the life of B., another of the executors and who had alone taken out probate, he had assisted in writing letters to the co-executors towards

collecting the testator's estate, and it was proved that A. had written on behalf of himself and his co-executors to a debtor of the testator requiring payment. Lord Camden, notwithstanding these circumstances, observed in his argument, that "B. undertook to act *solely*, and did act *solely* until he died," implying that A. had, by his conduct, not assumed the character of executor. But the case was one of "*cruel persecution*" against A.; and his Lordship put the fairest possible construction upon all that A. had done; and besides, Lord Camden might only have meant that B. was *substantially* the sole acting executor, without adverting to the question, whether the interference of A. ought or not, in strict legal construction, to be held an acceptance of the executorship.

untary interference with the subject-matter will convert a person into a trustee, must be taken with this qualification, that the interference is not such as to be *plainly* referable to some other ground than the part execution of the trust (*f*).

9. **Trustee may not act ambiguously, and then disclaim.** — If a trustee act *ambiguously* he cannot afterwards take advantage of the doubt, and say he acted not as trustee, but in some other character (*g*).

10. **Case of executorship clothed with a trust.** — If the office of executor be, by the will, clothed with certain trusts, a person named as executor who *proves* the will and thereby makes himself executor, is held to draw upon himself the obligations knit to the office of trustee. Thus, if a [*204] testator direct that *his *executors* shall get in certain outstanding effects to be applied to a particular purpose, a person cannot make himself executor by proving the will, and refuse the trust (*a*).

11. **Where the executor is also named as devisee upon trust.** — And if an *executor* be also designated trustee of the *real* estate, and he *acts as executor*, he is deemed to have accepted the entire trusteeship (*b*).

12. **Two trusts in same instrument.** — And if a person, by the same instrument, be nominated trustee of two distinct trusts, he cannot divide them: but if he accept the one, he will be taken to have accepted the other (*c*). However, these are the doctrines in a court of equity only, for at law an executor may accept that office and yet disclaim the devise to him of a legal estate (*d*).

13. **Taking custody of trust-deed not an acceptance of trust.** — Where a person was *named* as a trustee in a settlement, but he did not execute it, and declined to act, he was held

(*f*) *Stacey v. Elph*, 1 M. & K. 195; and see *Dove v. Everard*, 1 R. & M. 281; *S. C. Taml.* 376; *Lowry v. Fulton*, 9 Sim. 115.

(*g*) *Conyngham v. Conyngham*, 1 Ves. 522; *Montgomery v. Johnson*, 11 Ir. Eq. Rep. 476; see *Lowry v. Fulton*, 9 Sim. 115; *Doe v. Harris*, 16 M. & W. 517.

(*a*) *Mucklow v. Fuller*, Jac. 198; and see *Booth v. Booth*, 1 Beav. 125; *Williams v. Nixon*, 2 Beav. 472.

(*b*) *Ward v. Butler*, 2 Moll. 533.

(*c*) *Urch v. Walker*, 3 M. & Cr. 702.

(*d*) *Lord Wellesley v. Withers*, 4 Ell. & Bl. 750; and see *Bence v. Gilpin*, 3 L. R. Ex. 82.

not to have accepted the trust by merely taking the settlement into his custody until a trustee could be found (e).

14. **Devisee of several trust estates.** — If [in a case not falling within the Conveyancing and Law of Property Act, 1881 (f)] a trustee of two distinct settlements, created at different times and wholly independent of each other, devise *all* his trust estates to the same person, can such person accept one estate and disclaim the other? It would probably be held that he might; but he should lose no time in manifesting his intention; for, should he act as owner of one estate and not expressly disclaim the other, the law would presume him to have accepted both.

15. **Position of administrator where executor and trustee renounces.** — If A. be named as executor *and* trustee, and he renounces probate and disclaims the trust, and B. takes out letters of administration with the will annexed; B., though he thus becomes the personal representative, is not also the trustee of the will, nor is he a trustee in any sense, except as holding the surplus assets after the ordinary administration, with notice of a trust. A proper trustee can only be appointed by the Court (g).

16. **Executor converting himself into a trustee.** — Where a fund is given to a person upon certain trusts, and he is appointed executor, as soon as he has severed the legacy from the general assets, and appropriated it to the specific purpose, he dismisses the character of executor, and assumes that of trustee (h). * Indeed, the assent of [*205] the executor to a legacy to himself in trust, however proved, converts him to a trustee (a).

17. **Parol evidence.** — Upon the question of acceptance or non-acceptance of the office, *parol* evidence is of course admissible as on any other issue (b).

(e) *Evans v. John*, 4 Beav. 35.

[(f) 44 & 45 Vict. c. 41, s. 30.]

(g) See *Wyman v. Carter*, 12 L. R. Eq. 309.

(h) *Phillipo v. Munnings*, 2 M. & C. 309; *Byrchall v. Bradford*, 6 Mad. 13; S. C. ib. 235; *Ex parte Dover*,

5 Sim. 500; *Ex parte Wilkinson*, 3 Mont. & Ayr. 145; see *Willmott v. Jenkins*, 1 Beav. 401.

(a) *Dix v. Burford*, 19 Beav. 409.

(b) See *James v. Frearson*, 1 Y. & C. C. 370.

18. One nominated a trustee may sue as such without written acceptance. — If a person be asked and consent to become a trustee of a *marriage-settlement*, and thereupon his name is introduced into *articles* as the basis of the settlement, he may sue the parties bound by the articles for specific performance, though he may not have executed any written instrument declaratory of his acceptance of the trust (*c*).

19. Of acceptance under hand and seal. — With respect to the liability of the trustee, it is perfectly immaterial to him whether he *declare* his acceptance of the office by deed or parol, or his consent be *implied* from his acts, for in each case the obligations imposed upon him are precisely the same (*d*). In the event of a *breach of trust*, the consequences to the parties beneficially interested admitted until recent enactments of a slight variation. A breach of trust creates *per se* a *simple contract* debt only (*e*); but, if the trustee has covenanted under his hand and seal to execute the trust, even though the heirs be not named, the breach of trust, thus becoming a *specialty debt*, would, as respects legal assets, and as to the estates of testators or intestates who died before January, 1870, take precedence of simple contract debts (*f*). However, the mere fact of a trustee being made a party to and executing a deed appointing him to that office, does not of itself amount to a covenant on his part to execute the trusts, if the deed do not contain any words which could be construed a covenant at law (*g*); and if the deed do contain such words, yet the trustee

[*206] * cannot be sued upon covenant if he did not execute the deed; though, of course, after accepting

(c) *Cook v. Fryer*, 1 Hare, 498.

(d) See *Lord Montfort v. Lord Cadogan*, 19 Ves. 638.

(e) *Vernon v. Vawdry*, 2 Atk. 119; *S. C. Barn.* 280; *Cox v. Bateman*, 2 Ves. 19; *Kearnan v. Fitzsimon*, 3 Ridg. P. C. 18; *Lockhart v. Reilly*, 1 De G. & J. 464; *Jenkins v. Robertson*, 1 Eq. Rep. 128.

(f) *Wood v. Hardisty*, 2 Coll. 542; (see as to this case 1 Eq. Rep. 125); *Re Dickson*, 12 L. R. Eq. 154; *Gif-*

ford v. Manley, For. 109; *Mavor v. Davenport*, 2 Sim. 227; *Benson v. Benson*, 1 P. W. 131; *Deg v. Deg*, 2 P. W. 414; *Turner v. Wardle*, 7 Sim. 80; *Primrose v. Bromley*, 1 Atk. 89; *Cummins v. Cummins*, 3 Jones & Lat. 64; see *Baily v. Ekins*, 2 Dick. 632; *Norris v. Sadleir*, 8 I. R. Eq. 161, 519.

(g) *Adey v. Arnold*, 2 De G. M. & G. 433; *Isaacson v. Harwood*, 3 L. R. Ch. App. 225; *Holland v. Holland*, 4 L. R. Ch. App. 449; *Newport v.*

the trust he would be liable for a breach of contract, as for a simple contract debt (*a*). If he execute the deed, it is not necessary, in order to make it a covenant, that there should be the word *covenant*, but the word *agree* and *declare* (*b*), or the word *declare* alone will suffice (*c*). There is no magic in words, and it is simply a question of intention whether the execution of the deed was for the purpose of creating a specialty debt or *alio intuitu* (*d*). In the case of a trustee covenanting for himself and his *heirs*, a remedy lay at *common law* against the *heir* in respect of estates descended; and by 3 W. & M. c. 14, the like remedy was given against the *devisee* of the debtor: but this was only where the specialty would have supported an *action of debt*, as in the case of a bond, and did not apply to a *covenant*, by which, not a debt, was created, but *damages* were recoverable (*e*); but 11 G. 4, & 1 W. 4, c. 47, perfected the remedy by extending it to the case of a covenant [or other specialty. By the Conveyancing and Law of Property Act, 1881, unless a contrary intention is expressed, a covenant and a contract under seal, and a bond or obligation under seal, made, or implied by virtue of the Act, since the 31st December, 1881, though not expressed to bind the heirs, operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate, as if heirs were expressed (*f*). The effect of this section seems to be to extend the remedy given by 11 G. 4, & 1 W. 4, c. 47, to all specialty creditors, whether the heirs are named or not. By 3 & 4 W. 4, c. 104, it was] declared that the lands of a debtor should be liable to *all his debts*, whether on simple contract or on specialty;

Bryan, 5 Ir. Ch. Rep. 119; Marryat v. Marryat, 6 Jur. N. S. 572; Courtney v. Taylor, 6 M. & Gr. 851; Wynch v. Grant, 2 Drew, 312. It appears from the latter case, that in Adey v. Arnold, the trustee had executed the deed, a circumstance not mentioned in the report of Adey v. Arnold.

(*a*) Richardson v. Jenkins, 1 Drew. 477; Vincent v. Godson, 1 Sm. & G. 384.

(*b*) Westmoreland v. Tunncliffe, W. N. 1869, p. 182.

(*c*) Richardson v. Jenkins, 1 Drew. 477; and see Saltoun v. Houston, 1 Bing. N. C. 433; Cummins v. Cummins, 3 Jones & Lat. 64; 8 Ir. Eq. Rep. 723; Jenkins v. Robertson, 1 Eq. Rep. 123.

(*d*) Isaacson v. Harwood, 3 L. R. Ch. App. 225.

(*e*) Wilson v. Knubley, 7 East. 127. [(*f*) 44 & 45 Vict. c. 41, s. 59.]

but specialties, where the heir was bound, were still made to take precedent of simple contract debts, and specialties where the heir was not bound. A subsequent statute (*g*) has now abolished the distinction between simple contract debts and specialty debts, and directed all debts to be paid *pari passu* in the administration of estates of testators or intestates who may have died on or after the 1st of January, 1870.

20. **Duties consequent on acceptance.**—As soon as a trustee has accepted the office, he must bear in mind that he is [*207] not to sleep upon it, but is required to take an **active* part in the execution of the trust. The law knows no such person as a *passive* trustee. If, therefore, an unprofessional person be associated in the trust with a professional one, he must not argue, as is often done, that because the solicitor is better acquainted with business and with legal technicalities, the administration of the trust may be safely confided to him, and that the other need not interfere except by joining in what are called formal acts. If he sign a power of attorney for sale of stock, or execute a deed of reconveyance on repayment of a mortgage sum, he is as answerable for the money as if he were himself the solicitor and had the sole management of the transaction.

21. **A trustee on acceptance must inform himself of the state of the trust.**—Again, when a trustee has entered upon the trust, he is bound at once to acquaint himself with the nature and particular circumstances of the property, and to take such steps as may be necessary for the due protection of it (*a*). Thus he is not liable for the defaults of any predecessor in the trust, but if the fund is in danger and not in the state in which it ought to be, the Court will presume him to have made proper inquiries, and will hold him responsible if he does not take such measures as may be called for (*b*).

(*g*) 32 & 33 Vict. c. 46.

[(*a*) A trustee who brings an action for the protection of the trust property under the advice of counsel, is not *absolutely* indemnified by such advice from liability to the costs of the action

as between himself and his *cestuis que trust*, though such advice would go a long way to justify the proceedings, if instituted *bonâ fide*: *Stott v. Milne*, 25 Ch. D. 710.]

(*b*) See *Taylor v. Millington*, 4 Jur.

22. **Covenant to settle future property.**— But where a person was appointed new trustee of a marriage settlement, which contained a covenant by the husband for the settlement of the wife's future property, it was held that he was entitled to assume that the covenant had been duly performed up to the time of his becoming trustee, if he had no reason to suspect the contrary (c).

23. **Inventory.**— A trustee of chattels personal for the separate use of a wife must take care, on accepting the trust, to have the effects ascertained by a proper inventory, or in a suit for an account of the trust estate he may be deprived of his costs (d).

24. **A trustee by mistake.**— We may add in conclusion, that if a person by mistake or otherwise assume the character of trustee, when it really does not belong to him, and so becomes a *trustee de son tort*, he may be called *to account by the *cestuis que trust*, for the monies [*208] he received under colour of the trust. Thus, where a testator devised an estate to W. Thompson upon certain trusts, with a power of sale to him, his heirs and assigns, and the trustee devised all his real estate to his sister Grace Thompson, charged with 50*l.* to his friend Watson, and died leaving his brother Jonas Thompson his heir-at-law, and, on the death of the trustee, Grace Thompson assuming herself to be the devisee, sold the estate and received the money and paid it wrongfully to the tenant for life; in a suit against the representative of Grace Thompson, the Court held that, although she was neither heir nor devisee, yet as she had acted as trustee and received the money in that character, she was accountable for it to the *cestuis que trust* (a).

N. S. 204; *Townley v. Bond*, 2 Conn. & Laws. 406; *James v. Frearson*, 1 Y. & C. C. C. 370; *Ex parte Geaves*, 25 L. J. Bank. 63; 2 Jur. N. S. 651; *Youde v. Cloud*, 18 L. R. Eq. 634; and see *Malzy v. Edge*, 2 Jur. N. S. 80; but this decision seems opposed to the current of authorities.

(c) *Geaves v. Strahan*, 8 De G. M. & G. 291.

(d) *England v. Downs*, 6 Beav. 269; see 279.

(a) *Rackham v. Siddall*, 16 Sim. 297; affirmed by the Lord Chancellor on appeal as to the point under consideration, 1 Mac. & G. 607; *Pearce v. Pearce*, 22 Beav. 248; *Life Association of Scotland v. Siddall*, 3 De G. F. & J. 58; *Hennessey v. Bray*, 33 Beav. 96; *Yardley v. Holland*, 20 L. R. Eq. 428.

OF THE LEGAL ESTATE IN THE TRUSTEE.

UPON this subject we propose to treat, *First*. Of vesting the legal estate in the trustee; *Secondly*. Of the properties and devolution of the legal estate; and *Thirdly*. What persons taking the legal estate will be bound by the trust.

SECTION I.

OF VESTING THE LEGAL ESTATE IN THE TRUSTEE.

I. With reference to the *Statute of Uses*.¹

1. *Statute of uses*.—In the case of a simple trust, as the statute of 27 Henry the Eighth operates upon the *first use*, whether designated in the instrument as a *use* or *trust*, if a conveyance or devise be to A. and his heirs “*in trust*” for B. and his heirs, the possession will be executed in B. (a); and

(a) As in *Austen v. Taylor*, 1 Eden, &c. See *Broughton v. Langley*, 2 361; *Robinson v. Grey*, 9 East, 1; *Salk*, 679; *Chapman v. Blissett*, Cas. *Williams v. Waters*, 14 M. & W. 166, *t. Talb.* 150.

¹ *Statute of Uses*.—Even where direct words of trust are used, it may be that the trustee will receive no title, the statute causing both the equitable and legal title to vest immediately in the cestui que trust; *Witham v. Brooner*, 63 Ill. 344; *Thatcher v. Omans*, 3 Pick. 521; *Upham v. Varney*, 15 N. H. 466; *Bayer v. Cockerill*, 3 Kan. 282; *Parks v. Parks*, 9 Paige, 107; *Ramsay v. Marsh*, 2 McCord, 252; *Jackson v. Fish*, 10 Johns. 456; *Moore v. Shultz*, 13 Pa. St. 98; the intervening estate being immediately terminated; *Hutchins v. Heywood*, 50 N. H. 495: the statute is in force in most of the states; for its history in America, see 4 Kent Com. 299; 2 Wash. Real Prop. 152. See also the statutes of the various states; and their practical application may be followed through numerous decisions; *Marden v. Chase*, 32 Me. 329; *Dennett v. Dennett*, 40 N. H. 498; *Sherman v. Dodge*, 28 Vt. 26; *Baptist Soc. v. Hazen*, 100 Mass. 322; *Johnson v. Johnson*, 7 Allen, 197; *Nightingale v. Hidden*, 7 R. I. 132; *Bryan v. Bradley*, 16 Conn. 474; *Jackson v. Cary*, 16 Johns. 302; *Prince v. Sisson*, 13 N. J. Eq. 168; *Deibert's App.* 78 Pa. St. 296; *Earp's App.* 75 Pa. St. 119; *Matthews v. Ward*, 10 Gill. & J. 443; *Bass v. Scott*, 2 Leigh. 359; *Smith v. Lookabill*, 76 N. C. 465; *Ramsay v. Marsh*, 2

the statute must operate, notwithstanding the intention of the settlor to the contrary, for the will of the subject cannot control the express enactment of the legislature (*b*). In order, therefore, to prevent the legal estate from being executed in the *cestui que trust*, it is necessary to vest in the trustee not only the ancient common law fee, but also the primary use, as, by conveying or devising "to the trustee and his heirs *to the use* of the trustee and his heirs (*c*)," or "unto and *to the use* of the trustee and his heirs (*d*)"; for although by the latter form of *limitation the [*210] trustee will be *in* by the common law, yet, as the possession and the use are both vested in the trustee, the trust over, as not being the primary use, will not be affected by the statute.

(*b*) See *Cawardine v. Carwardine*, 1 Eden, 36. In *Gregory v. Henderson*, 4 Taunt. 772, Judges Chambre and Gibbs laid a stress on the testator's *intent*, but Judge Heath referred the case to the true principle, viz. that the trustees having a duty to perform, it was a trust special, and so out of the statute.

(*c*) *Robinson v. Comyns*, Cas. t. Talb. 164; *Attorney-General v. Scott*, id. 138; *Hopkins v. Hopkins*, 1 Atk. 589, *per* Lord Hardwicke.

(*d*) *Doe v. Passingham*, 6 B. & C. 305; *Doe v. Field*, 2 B. & Ad. 564; *Harris v. Pugh*, 12 Moore, 577; S. C. 4 Bing. 335; *Rackham v. Siddall*, 1 Mac. & G. 607.

McCord, 252; *Adams v. Guerard*, 29 Ga. 676; *You v. Flinn*, 34 Ala. 411; *Williams v. Church*, 1 Ohio St. 497; *Nelson v. Davis*, 35 Ind. 474; *Witham v. Brooner*, 63 Ill. 344; *Ready v. Kearsley*, 14 Mich. 228; *Guest v. Farley*, 19 Mo. 147; *Bayer v. Cockerill*, 3 Kan. 292. The statute does not execute the use in case of active trusts, and if anything remains for the trustee to do, the legal title remains in him; *Leggett v. Perkins*, 2 Comst. 297; *Norton v. Leonard*, 12 Pick. 152; *Meacham v. Steele*, 93 Ill. 135; *Adams v. Perry*, 43 N. Y. 487; *Morton v. Barrett*, 22 Me. 261; *Wood v. Mather*, 38 Barb. 473; *Nickell v. Handly*, 10 Gratt. 336; but see *McNish v. Guerard*, 4 Strob. Eq. 66. If several trusts are set forth together, some of which would be immediately executed and some not, the trustee holds the legal title; *Stockbridge v. Stockbridge*, 99 Mass. 244, but see *Leonard v. Diamond*, 31 Md. 536.

If the trust be for a married woman to her separate use, or to permit and suffer her to receive the rents, the legal title will vest in the trustee; *Richardson v. Stodder*, 100 Mass. 528; *Ayer v. Ayer*, 16 Pick. 330; *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Franciscus v. Reigart*, 4 Watts. 109; it has sometimes been held that property to "the sole and separate use" will not be recognized; *Westcott v. Edmunds*, 68 Pa. St. 34; *Roberts v. Moseley*, 51 Mo. 282; and *Ware v. Richardson*, 3 Md. 505. Commenting on the case of *Williams v. Waters*, the trust certainly would fail unless the woman was married, or in contemplation of marriage; *Yarnall's App.* 70 Pa. St. 339; *Hamersley v. Smith*, 4 Whart. 129; for sole use of C. and her children, not executed until possibility of children is extinct; *Brady v. Walters*, 55 Ga. 25.

2. **Special trusts not within the Act.**—*Special* trusts are not within the purview of the Act of Henry the Eighth (*a*); and therefore, if any agency be imposed on the trustee, as by a limitation to A. and his heirs, upon trust to *pay* the rents (*b*), or to *convey* the estate (*c*), or if any control is to be exercised, or duty is to be performed, as in the case of a trust to *apply* the rents to a person's *maintenance* (*d*), or in making *repairs* (*e*), or to *preserve contingent remainders* (*f*), and *à fortiori* if to *raise a sum of money* (*g*), or to *dispose of by sale* (*h*), in all these cases as the trust is of a special character, the operation of the statute of uses is effectually excluded. So if an estate be *devised* to trustees upon trust for a feme covert for her *sole and separate* use, and her *receipts alone to be discharges* (*i*). But if an estate be released by *deed* to A. and his heirs "upon trust," after the marriage of the relessor "for her and her assigns for life, for her *own sole and separate use*," but no *active* duty in respect of the separate use is expressed to be reposed in the trustee personally, a common law court has rejected the sole and separate use as an estate known only in equity, and held the legal estate for life to be executed in the *feme* (*j*).

3. **Trust to "permit and suffer A. to receive," &c. executed by the Act.**—And if the trust be simply to "*permit and suffer*

(*a*) See Introduction; and see Wright v. Pearson, 1 Eden, 125; Mott v. Buxton, 7 Ves. 201.

(*b*) Robinson v. Grey, 9 East, 1; Symson v. Turner, 1 Eq. Ca. Ab. 383, note, 3d resolution; Garth v. Baldwin, 2 Ves. 646; Chapman v. Blissett, Cas. t. Talbot, 145; Barker v. Greenwood, 4 M. & W. 429; Anthony v. Rees, 2 Cr. & Jer. 75; White v. Barker, 1 Bing. N. C. 573; Sherwin v. Kenny, 16 Ir. Ch. Rep. 138; and see Doe v. Homfray, 6 Ad. & Ell. 206; Kenrick v. Lord Beauchlerk, 3 Bos. & Pul. 178; Nevil v. Saunders, 1 Vern. 415; Jones v. Lord Say & Sele, 1 Eq. Ca. Ab. 383.

(*c*) Garth v. Baldwin, 2 Ves. 646; Doe v. Field, 2 B. & Ad. 504; Doe v. Edlin, 4 Ad. & Ell. 582; Doe v. Scott, 4 Bing. 505.

(*d*) Sylvester v. Wilson, 2 T. R. 444; Doe v. Edlin, 4 Ad. & Ell. 582.

(*e*) Shapland v. Smith, 1 B. C. C. 75.

(*f*) Bisco v. Perkins, 1 V. & B. 485; and see Barker v. Greenwood, 4 M. & W. 431.

(*g*) Wright v. Pearson, 1 Eden, 119; Stanley v. Lennard, 1 Eden, 87.

(*h*) Bagshaw v. Spencer, 1 Ves. 142.

(*i*) Harton v. Harton, 7 T. R. 652; and see Hawkins v. Luscombe, 2 Sw. 391; Nevil v. Saunders, 1 Vern. 415; Jones v. Lord Say & Sele, 1 Eq. Ca. Ab. 383; Doe v. Claridge, 6 C. B. 641; Williams v. Waters, 14 M. & W. 172.

(*j*) Williams v. Waters, 14 M. & W. 106. See Nash v. Allen, 1 H. & C. 167; and see *post*, p. 213.

A. to receive the rents" (*k*), the legal estate is executed in A. However, if the *lands be devised to [*211] three persons and their heirs in trust, to permit A. to receive the *net* rents for her life for her own use, and after her death to permit B. to receive the *net* rents for her life for her sole and separate use, with remainder over and a power of sale to the trustees, it has been held that the legal estate is in the trustees, for they are to receive the rents, and thereout pay the land-tax and other charges on the estate, and hand over the *net* rents only to the tenant for life (*a*).

[4. **Maintenance clause.**—And where real estate was devised to trustees their heirs and assigns, to the use of A. for life with remainder to the use of such child or children of A. as should attain twenty-one as tenants in common in fee, with remainders over, and the testator "empowered his trustees to apply the income to which under the disposition thereinbefore contained any infant devisee should be presumptively or otherwise entitled towards the maintenance and education or otherwise for the benefit of such devisee during his minority," it was held by V. C. Hall that the legal fee was in the trustees, inasmuch as the provision for maintenance showed that the intention was that the trustees should, under the disposition to them their heirs and assigns, take an estate by virtue of which they would receive the rents and profits (*b*).]

5. **Charge of debts.**—If the legal estate be limited to the trustees *charged with debts*, or *annuities*, and subject thereto in trust for A., but no direction to the trustees personally to *pay* the debts or annuities (*c*), here, as the trustees have no agency assigned to them, but merely stand

(*k*) *Boughton v. Langley*, 1 Eq. Ca. Ab. 383; S. C. 2 Salk. 679, overruling *Burchett v. Durdant*, 2 Vent. 311; *Right v. Smith*, 12 East, 455; *Wagstaff v. Smith*, 9 Ves. 524, *per* Sir W. Grant; *Gregory v. Henderson*, 4 Taunt. 773, *per* Heath, J.; *Warter v. Hutchinson*, 5 Moore, 143; S. C. 1 B. & C. 721; *Barker v. Greenwood*, 4 M. & W. 429, *per* Parke, B.

(*a*) *Barker v. Greenwood*, 4 M. & W. 421; *White v. Parker*, 1 Bing. N. C. 573.

[(*b*) *Berry v. Berry*, 7 Ch. D. 657.]

(*c*) *Kenrick v. Lord Beauchlerk*, 3 B. & P. 175; *Jones v. Lord Say & Sele*, 8 Vin. Ab. 262. But see *Creton v. Creton*, 3 Sm. & G. 386; *Baker v. White*, 20 L. R. Eq. 174; and see *Collier v. McBean*, 34 Beav. 426.

seised in trust, the statute will operate, and execute the possession in A.

6. *Doe v. Nicholls*.—And where copyholds were devised to trustees during the minority of the testator's son, "the same to be *transferred* to him" when he attained twenty-one, and if he died under twenty-one the testator gave the estate over, it was held that the trustees took a chattel interest only, until the son attained twenty-one, and that the copyholds then vested in the son. It was said, that if the devise were to the son on attaining twenty-one without the intervention of trustees, the *admission* of the son as tenant on the rolls would operate as a *transfer* of the estate, and that the words "the same to be transferred" did not imply [*212] that the *trustees* were to *transfer the legal estate (a). This construction, however, appears to be somewhat forced, and is not quite satisfactory.

7. *Trust to pay or permit, &c.*—Where the trust is "to pay unto *or* permit and suffer a person to receive" the rents, as the former words would create a special trust, and the latter would be construed a use executed by the statute, the Court holds, for want of a better reason, that the former or latter words shall prevail, as the instrument, in which they are found, happens to be a deed or a will (b). But it may be asked, why might not the settlor have meant to vest a *discretion* in the trustees, either to receive the rents themselves, *or* to put the *cestui que trust* in possession, and if so, the intention would require that the legal estate should be in the trustee. However, numerous titles must have been accepted on the faith of the case referred to, and at this distance of time it might be dangerous to reverse it; and this is the view adopted by the Court (c). [But this rule establishes no principle, and will readily yield to any indication of a contrary intention; and where the trust was to "pay the rents unto, or permit the same to be received by, one of the trustees," the Court of Appeal held that effect could be given to both sets of words, that there was no inconsistency, and conse-

(a) *Doe v. Nicholls*, 1 B. & C. 336.

(c) *Baker v. White*, 20 L. R. Eq.

(b) *Doe v. Biggs*, 2 Taunt. 109.

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quently the case of *Doe v. Biggs* had no application, and the legal estate remained in the trustees (*d*).]

II. Of the *quantity* of legal estate taken by the trustee with reference to the object and scope of the trust.¹

General rules. — As legal limitations are properly cognisable by a common-law court, it might be supposed that the construction put upon the instrument would stand wholly unaffected by the engraftment of a trust. But as the effect of the instrument is to be ruled by the intention, and as every person in limiting an estate to a trustee must be guided by the equity he proposes to raise upon it, the Courts as well of common law as of equity, and more particularly in the case of wills, have entered upon a consideration of the trust, in order to regulate within certain limits the extent of the legal interest by the scope and object of the equitable (*e*).

[(*d*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.] att, 17 Q. B. 292; *May v. Taylor*, 6 Man. & Gr. 261; *Walker v. Richardson*, 2 M. & W. 891.

(*e*) As to the cognisance of trusts by a Court of law, see *Sims v. Marry-*

¹ *Quantity of legal estate taken by trustee.* — Trustees hold in some cases no legal title, but merely a power of disposition; *Burke v. Valentine*, 52 Barb. 412; *Shelton v. Homer*, 5 Met. 462; *Bank v. Beverly*, 10 Pet. 532; *Deering v. Adams*, 37 Me. 264; in case of execution by the Statute of uses, only that estate passes which the trustee would take; *Baptist Soc. v. Hazen*, 100 Mass. 322; *Newhall v. Wheeler*, 7 Mass. 189; and the word "heirs" should be used; *Henderson v. Hunter*, 59 Pa. St. 335; but where the statute does not affect the trust, the trustee will take an estate commensurate in extent and duration with the object and extent of the trust; *Doe v. Ladd*, 77 Ala. 223; *Sears v. Russell*, 8 Gray, 86; *Zabriskie v. Railroad Co.* 33 N. J. Eq. 22; *Schaffer v. Lavretta*, 57 Ala. 14; *Brailsford v. Heyward*, 2 Desau. 290; *Gould v. Lamb*, 11 Met. 84, *Fisher v. Fields*, 10 Johns. 495; *Richardson v. Stodder*, 100 Mass. 528; *Newman v. Dotson*, 57 Tex. 117. "Wherever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not"; *Neilson v. Lagow*, 12 How. 98; *Packard v. Marshall*, 138 Mass. 301; *West v. Fitz*, 109 Ill. 425; *Barkley v. Dosser*, 15 Lea (Tenn.) 529; *Warner v. Sprigg*, 62 Md. 14; *Chamberlain v. Thompson*, 10 Conn. 244; *Powell v. Glen*, 21 Ala. 468; *Gill v. Logan*, 11 B. Mon. 238; *Webster v. Cooper*, 14 How. 499.

"Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires." *Norton v. Norton*, 2 Sandf. 296; *Slevin v. Brown*, 32 Mo. 176; *Wilcox v. Wheeler*, 47 N. H. 488; *Williman v.*

The following rules of construction have been adopted by the Courts in reference to this branch of our subject in the case of wills, and, except so far as they are controlled [*213] by the positive *enactments of the late Wills Act (a), must still be resorted to for guidance.

First, *Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied*: Secondly, *The legal estate limited to the trustee shall not be carried farther than the complete execution of the trust necessarily requires.*

First. As to the former rule.

1. **Legal estate supplied in toto on account of the trust.** — The Court has in some instances *supplied the estate in toto*; as where a testator devised to a *feme covert* the issues and profits of certain lands *to be paid by his executors*, and it was held that the land itself was devised to the executors in trust to receive the rents and profits and apply them to the use of the wife (b).

(a) 1 Vict. c. 26, ss. 30, 31.

4 T. R. 89; *Murphy v. Donnelly*, 4 I.

(b) *Bush v. Allen*, 5 Mod. 63; *Doe v. Homfray*, 6 Ad. & Ell. 206; and see *Oates v. Cooke*, 3 Burr. 1684; *Sir W. Black*, 543; *Doe v. Woodhouse*,

R. Eq. 111; *Stevenson v. Mayor of Liverpool*, 10 L. R. Q. B. 81; [*Davies to Jones*, 24 Ch. D. 190.]

Holmes, 4 Rich. Eq. 475; *McBride v. Smyth*, 59 Pa. St. 245; but see *McElroy v. McElroy*, 113 Mass. 509; *Watkins v. Specht*, 7 Cold. 585.

An executor sometimes receives the legal title as trustee, though there are no words to that effect, it being necessary in order to carry out the directions of the testator; *Freedley's App.* 60 Pa. St. 349; as power to repair and rent; *Kellim v. Allen*, 52 Barb. 605.

If the word "heirs" is omitted, the court will, if necessary, extend the estate so that the donor's intentions may not be defeated; *Cleveland v. Hallett*, 6 Cush. 407; *Hawkins v. Chapman*, 36 Md. 94; *Webster v. Cooper*, 14 How. 499; *Jackson v. Robins*, 16 Johns. 537; *Kirkland v. Cox*, 94 Ill. 402; *North v. Philbrook*, 34 Me. 537; a power of appointment will neither increase nor diminish the estate; *Burleigh v. Clough*, 52 N. H. 267; *Yarnall's App.*, 70 Pa. St. 342; the quantum of the estate is the same whether created by deed or will; *Watkins v. Specht*, 7 Cold. 585; *Attorney-Gen. v. Meeting House*, 3 Gray, 1; *King v. Parker*, 9 Cush. 71; *Welch v. Allen*, 21 Wend. 147; *Wright v. Delafield*, 23 Barb. 498.

As soon as an active trust ceases to be active, the statute will execute it in the cestui que trust, and this is not diminishing the estate, but simply following the provisions of the statute; *Parker v. Converse*, 5 Gray, 336; *Vallette v. Bennett*, 69 Ill. 632; *Greenwood v. Coleman*, 34 Ala. 150; *Churchill v. Corker*, 25 Ga. 479; *Stokes' App.* 80 Pa. St. 337; *Lynch v. Swayne*, 83 Ill. 336; but see *Read v. Power*, 12 R. I. 16; *Kirkland v. Cox*, 94 Ill. 402.

2. *Legal estates enlarged.*—In *other* cases the Court has *extended the estate*, as where, before the late Wills Act, the devise was to three trustees, and the survivor of them, and the executors and administrators of such survivor, upon trust to pay certain annuities for lives, and it was ruled that the trustees took an estate for the *several lives of the annuitants* (c).

3. *Trust to sell confers a fee.*—If land, said Lord Hardwicke, be devised to a man without the word *heirs*, and a trust be declared which can be satisfied in no other way but by the trustees taking an inheritance, it has been construed that a fee passes (d). Thus a trust to sell (e), even on a contingency (f), confers a fee simple as indispensable to the execution of the trust; and the construction is the same in a sale implied, as where the devise is upon trust out of the rents and profits of an estate to discharge certain legacies, made payable at a day inconsistent with the application of the annual profits only (g).

4. *Charges not implying a power of sale.*—But a power of selling will not be implied by a limitation to a trustee, or to a trustee his *executors and administrators* for and **until payment* of debts and legacies gener- [*214] ally (a), or for raising a sum of money out of the *rents and profits* (b); and therefore, in such cases, before the

(c) *Doe v. Simpson*, 5 East, 162; and see *Atcherley v. Vernon*, 10 Mod. 523; *Oates v. Cooke*, 3 Burr. 1684; *Shaw v. Weigh*, 2 Str. 798; *Jenkins v. Jenkins*, Willes, 656. In *Doe v. Simpson*, a life estate only was implied, as the trustee was merely such; but in *Jenkins v. Jenkins*, the trustee being also interested beneficially, the construction was more liberal, and it was thought the fee simple passed.

(d) *Villiers v. Villiers*, 2 Atk. 72.

(e) *Shaw v. Weigh*, 2 Str. 798; *Bagshaw v. Spencer*, 1 Ves. 144, per Lord Hardwicke; and see *Glover v. Monckton*, 3 Bing. 118; 10 Moore, 458. As to *Hawker v. Hawker*, 3 B. & Ald. 537, and *Warter v. Hutchinson*, 5 Moore, 148, S. C. 1 B. & C. 721,

see remarks, pp. 217, 218, note (j) *infra*.

(f) *Gibson v. Lord Montfort*, 1 Ves. 485, see p. 491.

(g) *Gibson v. Lord Montfort*, *ubi supra*.

(a) Co. Lit. 42, a; *Cordal's case*, Cr. Eliz. 315; *Carter v. Barnardiston*, 1 P. W. 505; *Hitchens v. Hitchens*, 2 Vern. 403; *Doe v. Simpson*, 5 East, 171, per Lord Ellenborough, C. J.; *Roberts v. Dixwell*, 1 Atk. 609, per Lord Hardwicke.

(b) *Doe v. Simpson*, 5 East, 162; and see *Bosworth v. Forard*, O. Bridg. Rep. 167; *Thomason v. Mackworth*, id. 507; Co. Lit. 42, a, note (7), Butler's ed.; *Collier v. Walters*, 17 L. R. Eq. 252.

late Wills Act, where nothing in the context implied a limitation of the fee, a chattel interest only would have passed. But, if a greater estate be limited expressly, as by a devise to A. *and his heirs* upon trust to pay debts, the Court has no jurisdiction to cut down the expression and reduce the estate to a chattel (*c*); though if a chattel interest be carved out of the fee and be so limited, the word "heirs" may be rejected as inconsistent with the estate, as where lands are devised to trustees and their *heirs*, until an infant attains twenty-one, and then to the infant in fee (*d*).

5. **Grant to two and the heirs of the survivor.**—If an estate be *granted* to two, and the survivor of them, and the heirs of such survivor, they are not joint tenants in fee, but take a freehold for their joint lives, with a contingent remainder to the one that may happen to survive. The same construction will be put upon a *devise* expressed simply in the same terms without any trust annexed, or even if there be a trust, provided the nature of it do not require the fee simple to be vested in the trustees (*e*). But if such a devise, even to beneficiaries, be coupled with words pointing to a joint tenancy, the construction will be a joint fee, as if the gift be to two and the survivor of them and *their heirs* (*f*), or to them as *joint tenants*, and the survivors and survivor of them, and the heirs and assigns of such survivor (*g*). And if the devise be to two and the survivor of them, and the heirs of such survivor upon trusts that require the fee simple to be vested in the trustees, or upon trust for *sale*, the prevailing opinion is, that notwithstanding the old case of *Vick v. Edwards* (*h*) to the contrary, the Courts would compel a purchaser to accept a title on the assumption that the trustees took the fee simple (*i*). "Whatever doubts," observes

(*c*) *Wright v. Pearson*, 1 Eden, 119, see p. 123.

(*d*) *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Lea*, 3 T. R. 41; *Warter v. Hutchinson*, 1 B. & C. 721; and see *Ackland v. Lutley*, 9 Ad. & Ell. 879; but see *Lethieullier v. Tracy*, 3 Atk. 780, *Fearne's C. R.* 226, *Butler's* note.

(*e*) *Re Harrison*, 3 Anst. 836.

(*f*) *Doe v. Sotheron*, 2 B. & Ad. 628; *Oakley v. Young*, 2 Eq. Ca. Ab. 537.

(*g*) *Goodtitle v. Layman*, *Fearne's C. R.* 358.

(*h*) 3 P. W. 372.

(*i*) See *Doe v. Ewart*, 7 Ad. & Ell. 636; *Doe v. Sotheron*, 2 B. & Ad. 628.

Butler, "were formerly entertained, it now appears to be the *settled opinion of the profession that a [*215] devise to two and the survivor of them, and the heirs and assigns of such survivor, enables the trustees to vest the fee in the purchaser, and that titles under such a devise are accepted with a conveyance from the trustees and without the concurrence of the heir" (a).

6. **Implied devise in the word "trustee."**—If a testator simply appoint a person his executor and *trustee*, it seems the latter word is not so exclusively applied to real estate, as to carry by implication to the executor a devise of the testator's freeholds, but if the testator direct certain acts to be done by the trustee, [or by the executor,] which belong to the owner of the freeholds, [or which require that the trustee or executor should have dominion over the real estate,] such a devise will be implied (b); [but the implication will only arise when it is necessary to make the words used by the testator sensible (c).] And so if a testator appoint a person his "trustee of inheritance," which is equivalent to making him the trustee of his inheritable property (d); or if a testator appoint "A. and B. trustees as also their *heirs* or assigns, not making them accountable for any losses except by their own neglect, and the one not to suffer for the other's negligence" (e). And if a testator constitute a trustee by will, and devise the legal estate to him, and then by a codicil "nominates and appoints another person to be *trustee*" in his place, the codicil not only confers the office of the trusteeship, but also carries the legal estate with it (f).

(a) Co. Lit. 191 a, note 1; and see Fearn's C. R. 358.

(b) Oates v. Cooke, 3 Burr. 1684; Bush v. Allen, 5 Mod. 63; Anthony v. Rees, 2 Cr. & Jer. 75; Doe v. Shotter, 8 Ad. & Ell. 905; [Davies to Jones, 24 Ch. D. 190; *Re Fisher and Haslett*, 13 L. R. Ir. 546.] If a testator appoint his solicitor sole trustee of his will, with a direction that the solicitor is to be paid as a solicitor as if he were not a trustee, it constitutes him a *trustee* only and

not an *executor*, according to the tenor of the will. *Re Goods of Lowry*, 3 L. R. P. & D. 157.

[(c) *Re Cameron*, 26 Ch. D. 19.]

(d) *Trent v. Hanning*, 1 B. & P. New Rep. 116; 10 Ves. 495; 7 East, 95; 1 Dow, 102; *Doe v. Pratt*, 6 Ad. & Ell. 180.

(e) *Bennett v. Bennett*, 2 Dr. & Sm. 266.

(f) *Re Hough's Will*, 4 De G. & Sm. 371; *Re Turner*, 2 De G. F. & J. 527.

If a testator by will devises to several persons upon trust, and nominates them his *trustees and executors*, and then by codicil revokes the appointment of one of them as *executor*, and substitutes another person as *executor* in his place, such revocation and new appointment extends only to the *executorship*, and does not by implication affect the *trusteeship* (g).

Legal estate curtailed from the nature of the trust. — *Secondly*, we proceed to illustrate the rule, that the legal estate limited to the trustee shall not be greater than is required by the trust.

[*216] *1. If a freehold estate be devised to A. and his heirs upon trust to *permit* B. to receive the rents during his life, and on his death to *convey* to C. in fee; here, as during the life of B. the trustees are to be merely passive, but after his death are to do an act, the legal estate for the life of B. is vested in B., and the remainder only in the trustee (a). On the other hand, if an estate be devised to A. and his heirs in trust, to *pay* the rents to B. for his life, and on his death, the testator devises the estate to C. in fee, here the legal estate for the life of B. is in the trustee, and the legal estate of the remainder is vested in C. (b). So where a *copyhold* was devised to A. and his heirs, upon trust for the separate use of B. a *feme covert* during her life, and after her decease the testatrix devised the same to such use as B. should appoint, and in default of appointment to the right heirs of B., it was thought by Judge Heath that the trustee took a base fee determinable by an executory devise over on the death of the *feme covert*, and by Judge Chambre that the

(g) *Worley v. Worley*, 18 Beav. 58; *Graham v. Graham*, 16 Beav. 550; *Cartwright v. Shephard*, 17 Beav. 301; *Barrett v. Wilkins*, 5 Jur. N. S. 687.

(a) *Doe v. Bolton*, 11 Ad. & Ell. 188; *Adams v. Adams*, 6 Q. B. 860.

(b) *Adams v. Adams*, 6 Q. B. 860; *Cooke v. Blake*, 1 Exch. 220; *Jones v. Lord Say & Sele*, 8 Vin. Ab. 262; *Doe v. Simpson*, 5 East, 171, *per* Lord Ellenborough; *Robinson v. Grey*, 9 East, 1; *Doe v. Ironmonger*, 3 East, 583; *Warter v. Hutchison*, 5 Moore,

143; S. C. 1 B. & C. 721; and see *Nash v. Coates*, 3 B. & Ad. 839; *Ward v. Burbury*, 18 Beav. 190; *Doe v. Cafe*, 7 Exch. 675. Note, *Harton v. Harton*, 7 T. R. 652, can scarcely be reconciled with principle, and seems to have been disapproved by Lord Eldon in *Hawkins v. Luscombe*, 2 Sw. 391; but Sir J. Wigram considered himself bound by it in *Brown v. White-way*, 8 Hare, 145, and the Court of Q. B. recognised its authority, at least to a partial extent, in *Toller v. Attwood*, 15 Q. B. 951.

devise amounted only to an estate *pur autre vie* (c). So where a testator devised *leaseholds for years* to trustees upon trust for A. for life, and after the death of A. the testator bequeathed them to B., it was held that the trustees had the legal estate during the life of A. only (d). Thus in freeholds, copyholds, and leaseholds, where there is an indefinite devise to trustees and their heirs, executors, or administrators, upon certain trusts confined to the life of one person, followed by a simple devise to another for the absolute interest, in each case the estate of the trustees is limited by implication to the life of the person who takes the life interest (e).

It has sometimes been argued that where *freeholds* are coupled with *copyholds* or *leaseholds* upon certain trusts, if the legal estate of the copyholds or leaseholds be vested in the trustees, there is a *kind of attraction [*217] which will cause the legal estate of the freeholds also to be vested in the trustees; but whatever attraction may arise from the presumption that the different kinds of property were meant to be held together during the continuance of the trusts effecting them, there is no such attraction as will keep the legal estate of any species of property vested in the trustees beyond the period limited for the trusts of that property (a). It seems, however, that in a *deed*, where the construction adheres more strictly to the letter, a limitation to trustees and *their heirs* upon trust to pay an annuity for life only, with remainders over, would have conferred the fee simple (b).

2. **Limitation to trustees and their heirs to preserve contingent remainders, the words "during the life of," &c. being omitted.**—In a *devise* to A. for life, remainder to trustees and their heirs to preserve contingent remainders (the words "during the life of A." being omitted), with remainders over, the

(c) *Doe v. Barthrop*, 5 Taunt. 382; *Baker v. White*, 20 L. R. Eq. 166; and see *Ward v. Burbury*, 18 Beav. 190; *Doe d. Players v. Nicholls*, 1 B. & C. 342; *Doe v. Cafe*, 7 Exch. 675.

(d) *Stevenson v. Mayor of Liverpool*, 10 L. R. Q. B. 81.

(e) *Baker v. White*, 20 L. R. Eq. 177, *per cur.*

(a) *Baker v. White*, 20 L. R. Eq. 166.

(b) *Wykham v. Wykham*, 11 East, 458; see S. C. 18 Ves. 419, and following pages; 3 Taunt. 316.

trustees are construed to take not a fee simple, but an estate for the life of A. (c). And Sir W. Grant expressed himself in favor of a similar construction where the instrument was a deed (d); but it has since been decided that in the latter case a fee simple passes (e), unless it be quite clear upon the face of the deed itself that the words "during the life of A." were meant to be in the deed, and were wanting through inadvertence (f). Of course there can be no such restriction of the estate by implication where the natural sense of the words admits of a fair and reasonable construction; as if before the late Act (g) the fee simple in the trustees would have supported contingent limitations that would otherwise have been left at the mercy of the tenant for life (h).

3. **Trust to lease, &c. confers fee-simple.** — But if a devise be to trustees and their heirs upon a trust that cannot be executed without an absolute control over the property, as in trust to lease for an indefinite number of years (i), or to raise a sum of money by sale (j), and subject thereto [*218] to uses in strict *settlement, the trustees will not

(c) *Doe v. Hicks*, 7 T. R. 433; *Haddelsley v. Adams*, 22 Beav. 267; as to *Boteler v. Allington*, 1 B. C. C. 72, see *Doe v. Hicks*, 7 T. R. 435, and *Wykham v. Wykham*, 18 Ves. 418; and see *Nash v. Coates*, 3 B. & Ad. 839.

(d) *Curtis v. Price*, 12 Ves. 89; but see *Wykham v. Wykham*, 18 Ves. 419, and following pages.

(e) *Colmore v. Tyndall*, 2 Y. & J. 605; *Lewis v. Rees*, 3 K. & J. 132; *Cooper v. Kynock*, 7 L. R. Ch. App. 398.

(f) *Beaumont v. Marquis of Salisbury*, 19 Beav. 198.

(g) 8 & 9 Vict. c. 106, s. 8.

(h) *Venables v. Morris*, 7 T. R. 342, 438; and see *Curtis v. Price*, 12 Ves. 100; *Doe v. Hicks*, 7 T. R. 437; *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 169; 2 Dr. & War. 16.

(i) *Doe v. Willan*, 2 B. & Ald. 84; but see *Heardson v. Williamson*, 1 Keen, 33; *Ackland v. Lutley*, 9 Ad. & Ell. 879.

(j) *Wright v. Pearson*, 1 Eden, 123; *Bagshaw v. Spencer*, 1 Ves. 142; *Glover v. Monckton*, 3 Bing. 18; *Bale v. Coleman*, 2 Eq. Ca. Ab. 309; note (e); *Sanford v. Irby*, 3 B. & Ald. 654; *Jones v. Morgan*, 1 B. C. C. 206; for a correct report of the will, see *Fearne's C. R. Appendix*, No. 3. It has been observed in the "Treatise of Powers" (Sug. Pow. 111, 8th edit.), that this rule was not attended to in the case of *Hawker v. Hawker*, 3 B. & Ald. 537. The devise was probably considered to be of a double aspect, viz. to the trustees and their heirs upon trust to sell, &c., if one event happened, and upon trust for the daughter, &c., if another event happened, and as the latter series of limitations took effect, and therefore no power of sale was to be exercised by the trustees, it was not necessary under the circumstances to arm them with the inheritance. The case of *Warter v. Hutchinson*, 5 Moore, 143, 1 B. & C. 721, is more difficult to be

be held to take a mere *power* so as to let in the statute to execute the uses in strict settlement, but will be construed to take the legal *estate* in fee, and the uses that are limited will stand as equitable interest.

Charge of debts.—So if copyholds be devised to trustees (who are also appointed executors of the testator) and the survivor of them, and the heirs of such survivor, charged with debts, and subject thereto upon trust to pay the rents to the testator's daughter for life, and after her death, the copyholds are devised by the testator directly to the heirs of the body of such tenant for life, here, as the charge of debts may require the fee simple to be in the trustees, they take the legal estate not only for the life of the tenant for the life but absolutely, and the issue in tail take only equitable estates (*a*).

[So where a testator directs his debts to be paid, or directs them to be paid by his executors, and devises real estate to trustees and their heirs upon trusts which do not exhaust the fee, and then devises the real estate after the determination of the preceding trusts directly to a third person, and appoints the trustees his executors, the trustees take the legal fee by virtue of the charge of debts (*b*).]

4. Present rule regulating devises to trustees.—Recent cases have established the following important qualification of the rule now under consideration, viz., that where an estate is in the first instance given to trustees and their heirs upon trusts which do not exhaust the equitable fee simple, and for which a particular estate short of the legal fee in the trustees would be sufficient, but discretionary powers are superadded which cannot be exercised by the trustees without arming them with the * means of pass- [*219] ing the fee simple, there the trustees do not take a

reconciled with the rule we are discussing. The construction appears to have been, that, as the limitation to the trustees and their heirs was expressly limited to the period until *A. attained twenty-one*, the estate was intended to be a chattel interest only, and the charges were to be raised either by sale or mortgage of that

chattel interest, or out of the inheritance by virtue of an implied power.

(*a*) *Creton v. Creton*, 3 Sm. & G. 386.

[(*b*) *Creton v. Creton*, 3 Sm. & G. 386; *Re Tanqueray-Willame & Landau*, 20 Ch. D. 465; *Marshall v. Gingell*, 21 Ch. D. 790; *Spence v. Spence*, 12 C. B. N. S. 199.]

particular estate by way of vested interest with the power under the Statute of Uses or by a common law authority of passing the fee, but they retain the legal fee simple given to them in the first instance, on the footing that they were meant to exercise the discretion given to them by virtue of their *ownership* and not by the mere operation of a *power* (a). Baron Parke observed, in the leading case (b), "When an estate is given to trustees, all the trusts must *primâ facie* at least be performed by them by virtue and in respect of the estate vested in them. — The fee is in terms devised to them, and it would be a very strained and artificial construction to hold first that the natural meaning of the words is to be cut down, because they would give an estate more extensive than the trust required, and then when the trust does require the whole fee simple, to hold that that must be supplied by way of *power* defeating the estate to the subsequent devisees, and not out of the *interest* of the trustees."

5. *Devise to uses.* — The rule of construction laid down in this case has since been followed, even where the language of the subsequent limitations has been peculiarly applicable to a devise of the legal estate, as where after the primary devise to the trustees and their heirs upon limited trusts with discretionary powers the estate was expressed to be limited in strict settlement, by a declaration of *uses* to that effect (c).

6. *Where the powers do not effect the fee.* — But where the devise, before the late Wills Act, was to trustees and their heirs upon trust for a person for life, and after her death upon certain trusts during the minority of her children, followed by a direct devise to the children on the youngest attaining 21, without words of limitation (and therefore

(a) *Watson v. Pearson*, 2 Exch. 581; *Blagrove v. Blagrove*, 4 Exch. 550; *Davies v. Davies*, 1 Q. B. 430; *Doe v. Cadogan*, 7 Ad. & Ell. 636; *Rackham v. Siddall*, 1 Mac. & G. 607; *Poad v. Watson*, 6 Ell. & Bl. 606; and see *Watkins v. Frederick*, 11 H. L. Cas. 358.

(b) *Watson v. Pearson*, 2 Exch. 593.

(c) *Blagrove v. Blagrove*, 4 Exch. 550; *Rackham v. Siddall*, 1 Mac. & G. 607; [and see *Berry v. Berry*, 7 Ch. D. 657.]

construed to give life estates only) with a *mere power of leasing for 21 years*, to be exercised during the continuance of the trust without any purpose affecting the fee simple, and which power of leasing extended to other estates also, which were clearly devised to the beneficiaries directly, it was held that the mere power of leasing was not sufficient to countervail the rule that the legal estate was not to be extended beyond the necessity of the trust, and that under all the circumstances the trustees took an estate for the * life of the mother and the minority of the child [*220] with a *power of leasing (a)*.

7. **Late Wills Act.**—The law upon the subject has now undergone some alteration from the provisions of the late Act (7 W. 4. and 1 Vict. c. 26) for the amendment of the law of wills.

By the 30th section it is declared, “that where any real estate (other than or not being a presentation to a church) shall be devised to any *trustee or executor*, such devisee shall be construed to pass *the fee simple*, or other the *whole estate or interest* which the testator had power to dispose of by will in such real estate, unless a *definite term of years*, absolute or determinable, or an *estate of freehold* shall thereby be given to him, *expressly or by implication*.”

And by the following section it is enacted, “that where any real estate shall be devised to a trustee *without any express limitation of the estate* to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life, or shall be given for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee *the fee simple* or other the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied.”

Effect of the Act.—The effect of these provisions is by no means clear, but it is conceived that a *definite* chattel interest, as a term of 99 years, or a simple *freehold*, as an estate

(a) *Doe v. Cafe*, 7 Exch. 675; and see *Adams v. Adams*; 6 Q. B. 860; *Lambert v. Browne*, 5 L. R. C. L. 218.

for the life of A., may still either be limited expressly to trustees or be raised by implication; and that in cases where before the Act an *indefinite* chattel interest would have passed, as in a devise to trustees (without the word "heirs") to pay debts, or a freehold with an indefinite interest super-added, as in *Doe v. Simpson* (b), there the words of the will are for the future made to pass the fee simple (c).

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* SECTION II.

THE PROPERTIES AND DEVOLUTION OF THE LEGAL ESTATE IN THE
TRUSTEE.

This branch of our subject we propose to consider, First, with reference to the common law; and, Secondly, with reference to the construction of particular statutes.

First. Of the legal estate at common law.¹

1. **Legal estate at common law.** — It may be stated as a general rule, that the legal estate in the hands of the trustee has at common law precisely the same properties and incidents as if the trustee were the usufructuary owner.

Of dower, curtesy, &c. — If real estate be put in trust it is subject at law in the hands of the trustee to curtesy (a), and

(b) 5 East, 162.

p. 119; 2 Jarm. on Wills, 4th Ed. p.

(c) See the observations on the 320.

above clauses, H. Sugden on Wills,

(a) Bennet v. Davis, 2 P. W. 319.

¹ *Properties of the legal estate.* — At common law the legal title vests in the trustee, with all the properties incident to it, which would be present if he were the absolute owner; *Devin v. Hendershott*, 32 Ia. 192; *Campbell v. Prestons*, 22 Gratt. 396; *Croxall v. Shererd*, 5 Wall. 268; but now there is no dower or curtesy in the legal title to the trust estate; *White v. Drew*, 42 Mo. 561; *Buffalo &c. R. R. Co. v. Lampson*, 47 Barb. 533; *McClellan v. McClellan*, 65 Me. 500; *Dean v. Mitchell*, 4 J. J. Marsh. 451; *Gomez v. Bank*, 4 Sandf. 102; *Bartlett v. Gouge*, 5 B. Mon. 152; but see *Dubs v. Dubs*, 31 Pa. St. 154; but they will attach to the equitable estate; *Hopkinson v. Dumas*, 42 N. H. 303; *Prescott v. Walker*, 16 N. H. 343; and this is generally true in the United States; *Hawley v. James*, 5 Paige, 318; *Lewis v. James*, 8 Humph. 537; *Peay v. Peay*, 2 Rich. Eq. 409; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Cushing v. Blake*, 30 N. J. Eq. 689; *Houghton v. Hopgood*, 13 Pick. 154; but see *Reed v. Whitney*, 7 Gray. 533; *Lobdell v. Hayes*, 4 Allen, 187; *Hamlin v. Hamlin*, 19 Me. 141; if the *cestui que trust* have no next of kin, the trustee holds personalty, and probably realty, subject to the state; *Crane v. Reeder*, 21 Mich. 25.

dower (*b*), and in the case of copyhold to freebench (*c*); and until a late Act the trust estate was liable to forfeiture (*d*), and on the decease of the trustee, if there was no heir, it fell by escheat to the lord (*e*); but by 13 & 14 Vict. c. 60, ss. 15, 46, (substituted for 4 & 5 W. 4, c. 23,) the legal estate of trust property was protected from forfeiture and escheat (*f*). And by another Act (*g*), it was enacted that, "Upon the death of a bare * trustee, *intestate* as to any cor- [*222] poreal or incorporeal hereditament, of which such trustee was seised in fee simple, such hereditament should vest, like a chattel real, in the legal personal representative from time to time of such trustee." But the Act was not to apply to lands registered under the same Act.

(*b*) *Noel v. Jevon*, Freem. 43; *Nash v. Preston*, Cro. Car. 190.

(*c*) *Hinton v. Hinton*, 2 Ves. sen. 631, 638; *Bevant v. Pope*, Freem. 71; and see *Brown v. Raindle*, 3 Ves. 256.

(*d*) *Pawlett v. Attorney-General*, Hard. 466, *per Lord Hale*; *Geary v. Bearcroft*, Cart. 67, *per Cur.*; *King v. Mildmay*, 5 B. & Ad. 254.

(*e*) *Jenk.* 190, c. 92.

(*f*) See *infra*.

(*g*) 38 & 39 Vict. c. 87, s. 48 (repealing 37 & 38 Vict. c. 78, s. 5). In a recent case a discussion arose as to the meaning of the expression a *bare trustee*. V. C. Hall observed, "Where there is a trustee whose trust is to convey and the time has arrived for a conveyance by him, he is, I think, a bare trustee," and then adverting to Dart's "Vendors and Purchasers," in which it is laid down, that "a *bare trustee* would probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction, and has been requested by them so to convey it," the V. C. approved of the statement, save only that the

words, "and has been requested by them so to convey it," should be left out, inasmuch as they were not an important or necessary ingredient. But it may well be doubted whether this is so. For if an estate be vested in trustees in trust to sell and divide the proceeds amongst a class, the trustees are bound to convey by the direction of the class if *sui juris*, but certainly are not bare trustees until the joint request to convey has countermanded the trust for sale. *Christie v. Ovington*, 1 Ch. D. 279. [However in a subsequent case M. R. withheld his approval of the above definition of a "bare trustee," and while expressly abstaining from deciding the point intimated an opinion that a "bare trustee," meant a trustee without any beneficial interest, whether he had active duties to perform or not. See *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582. But in a still later case V. C. Bacon held that trustees of real estate devised upon trust for sale, the sale of which had been ordered in an action to administer the testator's estate, were bare trustees, although they took beneficial interests in the proceeds of sale; *Re Docwra*, 29 Ch. D. 693.]

[Under 44 & 45 Vict. c. 41, legal estate devolves to personal representative. — This enactment is, however, in the case of deaths occurring after the 31st December, 1881, repealed and its place supplied by a provision that “where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage (a), in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased’s personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this section the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers” (b).]

[(a) By 37 & 38 Vict. c. 78, s. 4, the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee was admitted, was empowered on payment of all sums secured by the mortgage to convey or surrender the mortgaged estate. This section was held not to apply to a transfer of a mortgage of a freehold estate, *Re Spradbery’s Mortgage*, 14 Ch. D. 514; or to a sale by the executors, under a power in the mortgage deed, *Re White’s Mortgage*, 51 L. J. N. S. Ch. 856; and has in the case of a death occurring after the 31st December, 1881, been repealed by 44 & 45 Vict. c. 41, s. 30.]

[(b) 44 & 45 Vict. c. 41, s. 30; this section applies to copyholds, *Re*

Hughes W. N. 1884, p. 53. If upon the death, intestate, of a sole surviving trustee new trustees are appointed under the Trustee Acts, the vesting order should vest the trust estates in them “for the estate therein which would now be vested in (the intestate) if now living,” *Set. on Dec.*, 4th Ed. p. 539; or “for all the estate and interest which the deceased trustee had in him immediately before (or at the time of) his death,” *Re Rackstraw’s Trusts*, 52 L. T. N. S. 612; 33 W. R. 559. Where the order was made vesting the property in the new trustees “for the estate therein now vested in the heir-at-law of the deceased trustee,” and letters of administration were subsequently taken out to the estate of the deceased trustee,

2. **Trust chattels subject to forfeiture, &c.** — So chattels real and personal held upon trust were forfeitable until the late Act (which extends to personal as well as real estate), * for the offence of the trustee (*a*); but in the case [*223] of two joint trustees, a moiety only was forfeited, and the King and the other trustee were tenants in common (*b*).

Devolve on executor. — On the decease of the trustee the chattel, as part of his personal estate at law, devolves on his executor or administrator. And if the executor die after probate, having appointed an executor, the chattel becomes vested in that executor.

3. **Renunciation by one executor.** — Until a late Act, if an executor had renounced probate, the renunciation, though *prima facie* absolute (*c*), might have been retracted at any time before a new administration was granted. Hence where two executors were named and one renounced, and the acting executor died having appointed executors, but pre-deceased his co-executor, it was necessary to take out letters of administration to the original testator, for the acting executor not being the survivor did not transmit the interest, and the renouncing executor declined to act (*d*). But now by 20 & 21 Vict. c. 77, s. 79, where an executor *renounces probate*, the rights of such executor are made to cease; and the representation to the testator and the administration of his effects, without further renunciation, go, devolve and are committed as if such person had not been appointed executor (*e*). But the Act does not apply to the case of a person who renounced before the Act came into operation, and if he renounced before the Act, any second renunciation after the Act for the purpose of bringing himself

the question arose whether the vesting order had any effect, having regard to the 30th sect. of the late act, and the Court, upon motion, directed that "notwithstanding the previous order, the land should vest in the new trustees for all the estate therein then vested in the legal personal representative," *Re Pilling's Trusts*, 26 Ch. D. 432.]

(*a*) *Pawlett v. Attorney-General*,

Hard. 466, *per* Lord Hale; *Wike's case*, Lane, 54; *Scounden v. Hawley*, Comb. 172, *per* Dolben, J.; *Jenk.* 219, c. 66; *ib.* 245, c. 30.

(*b*) *Wike's case*, Lane, 54.

(*c*) *Venables v. East India Company*, 2 Exch. 633.

(*d*) *Arnold v. Blencowe*, 1 Cox, 426.

(*e*) *In re Goods of C. Lorimer*, 10 W. R. 809, & 2 S. & T. 471.

within it is *ultra vires* and nugatory (*f*), and a disclaimer, or renunciation by answer in chancery was held not to operate as a renunciation within the Act (*g*), and a renunciation is not complete until it has been entered and recorded in the proper office (*h*). But it has not been settled that an executor after renunciation may not on proper grounds retract his renunciation (*i*). By 21 & 22 Vict. c. 95, s. 22, whenever an executor survives the testator, but dies without having taken probate, or is cited to take probate and does not appear, the right of such person in respect of the executorship shall wholly cease, and representation to the [*224] testator and the administration of *his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor.

4. **Whether term in a trustee requires a prerogative probate.**—If the lands comprised in a trust term were situate in a different diocese from that in which the trustee was domiciled, it seems that previously to 20 & 21 Vict. c. 77, which created the Court of Probate, a *prerogative* probate or limited administration was necessary before the term could have been legally transferred (*a*).

Administration limited to trust property.—If there be a difficulty in the way of probate or grant of *general* letters of administration, *special* letters of administration limited to the *trust property* may be taken out (*b*).

5. **Whether a chattel may be taken in execution for the debt of the trustee.**—A chattel found by the sheriff in the possession of a debtor is *prima facie* the debtor's own property, and as such is liable to be taken in execution for his debt, but if the sheriff knowing the chattel to be bound by a clear trust for another were to sell it for the debt of the trustee, it would be a tortious act in him (*c*), and the creditor who

(*f*) *Re Whitham*, 1 L. R. P. & D. 303; *In the Goods of Delacour*, 9 L. R. Eq. 86.

(*g*) *Chalon v. Webster*, W. N. 1873, p. 189.

(*h*) *In the Goods of Morant*, 3 L. R. P. & D. 151.

(*i*) *In the Goods of Gill*, 3 L. R. P. & D. 113.

(*a*) See *Crosley v. Archdeacon of Sudbury*, 3 Hagg. 201.

(*b*) *In the Goods of Prothero*, 3 L. R. P. & D. 209.

(*c*) *Farr v. Newman*, 4 T. R. 621,

received the proceeds would be accountable as a trustee (*d*), and the *cestui que trust* may, upon seizure by the sheriff, establish his equitable title at law upon an interpleader summons (*e*).

On the other hand, if a person be the *cestui que trust* of an equitable chattel, the sheriff may take it in execution for the debt of the *cestui que trust*; and this is so even when the *cestui que trust* claims under an agreement for valuable consideration for the settlement of after-acquired property (*f*). But such an agreement is a roving one and executory, and does not give the *cestui que trust* the privileges of the specific purchaser until actual possession of the chattel under the agreement, and the interest of the *cestui que trust* may therefore be defeated by a judgment creditor of the settlor, who takes out execution before actual possession by the *cestui que trust* (*g*).

6. The common law recognizes assets in the hands of an executor to be trust property. — *Assets* in the hands of an executor are regarded as a species of trust property, even by the common law, which in respect of them has engrafted upon itself a *quasi* equitable jurisdiction: as, if an executrix marry, she may by will, without the consent of her husband, appoint an executor in whom the assets will vest, and * who will thus become the executor of the original testator (*a*); and though the husband during the coverture has power to dispose of the assets in the course of administration (*b*), he will not be entitled to them in his marital right by survivorship (*c*); and if the wife survive she is liable for the devastavit committed by her hus-

per Ashurst, J., and see *Blake v. Done*, 7 H. and N. 465, and p. 245, post, as to judgments. See now 36 & 37 Vict. c. 66, s. 24.

(*d*) *Foley v. Burnell*, 1 B. C. C. 278.

(*e*) *Duncan v. Cashin*, 10 L. R. C. P. 554.

(*f*) *Interpleader Summons*, W. N. 1875, p. 203; W. N. 1876, p. 64.

(*g*) *Holroyd v. Marshall*, 2 De G. F. & J. 596.

(*a*) *Scammel v. Wilkinson*, 2 East, 552; *Hodsdon v. Lloyd*, 2 B. C. C. 543, per Lord Thurlow.

(*b*) *Thrustout v. Coppin*, 2 W. Black. Rep. 801; [this will not be the case where the marriage has taken place or the executorship has arisen since 1st January, 1883, 45 & 46 Vict. c. 75.]

(*c*) Co. Lit. 351 a, 351 b: *Stow v. Drinkwater*, Lofft, 83.

band (*d*); nor can the assets be taken in execution for the debt of the executor (*e*), [unless under such special circumstances as give the creditors of the executor a better equity than the creditors of the testator, as where the executor has been allowed to retain the assets for a considerable time and deal with them as his absolute property (*f*); but possession by the executor of the assets for a long time if in accordance with the trusts will not raise such an equity (*g*); and if, under the old law as to forfeiture, the executor] committed felony or treason, the assets were exempted from forfeiture to the crown (*h*); and if the executor die intestate instead of vesting in his administrator, they vest in the administrator *de bonis non* of the testator (*i*).

7. **Attachment.** — Attachment by the custom of the City of London does not apply to debts [where the beneficial interest is vested in a person other than the defendant sued in the Lord Mayor's Court and the garnishee has notice of the trust (*j*).]

8. **Trustee may deal with the trust estate by Act inter vivos.** — A trust estate, whether real or personal, may, *at law*, be conveyed, assigned, or encumbered by the trustee, like a beneficial estate; and, if there be co-trustees, each may exercise the like powers of ownership over his own proportion. Thus if lands be vested in trustees as joint-tenants, each may at law receive the rents (*k*), and each may at law sever the joint-tenancy by a conveyance of his share (*l*); and if the trust estate be stock each may receive the dividends without any authority from the co-trustee.

General words. — But, in dealings with the trust estate,

(*d*) *Soady v. Turnbull*, 1 L. R. Ch. App. 494.

(*e*) *Farr v. Newman*, 4 T. R. 621; [*Re Morgan*, 18 Ch. D. 93.]

[(*f*) *Ray v. Ray*, G. Coop, 264; *Kitchen v. Ibbetson*, 17 L. R. Eq. 46; and see *In re Fells*, 4 Ch. D. 509; *Re Morgan*, 18 Ch. D. 93.]

[(*g*) *Fenwick v. Laycock*, 2 Q. B. 108; *Re Morgan*, 18 Ch. D. 93; and see *Ex parte Barber*, 42 L. T. N. S. 411, 28 W. R. 522.]

(*h*) *Farr v. Newman*, 4 T. R. 628, *per Grose, J.*; [see now 33 & 34 Vict. c. 23.]

(*i*) *Ib. per eundem*; *Rachfield v. Careless*, 2 P. W. 161, *per Powis, J.*

(*j*) *Westoby v. Day*, 2 Ell. & Bl. 606; *Lewis v. Wallis*, Sir T. Jones, 222.

(*k*) *Townley v. Sherborne*, Bridge. 85.

(*l*) *Boursot v. Savage*, 2 L. R. Eq. 134.

the Court has regard to the trust, and will not construe *general* words to pass the trust * estate where [*226] the assurance, if so construed, would amount to a breach of trust (a).

9. *May devise or bequeath it.* — As the trustee may at law dispose of the property in his lifetime, so he may devise or bequeath it at his death; [but in the case of a trustee or mortgagee dying after the 31st December, 1881, “any estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal,” will, notwithstanding any testamentary disposition devolve on the personal representative of the trustee or mortgagee, in the same manner as if it were a chattel real (b). It is therefore useless for a trustee or mortgagee to devise property of the above description, and the title to such property must be made through the legal personal representative.]

But a trust estate will not in all cases *pass by the same words* in a will as a beneficial ownership would, for wherever the estate does not pass by operation of law solely, but through the medium of the intention, it becomes necessary, in order to ascertain the effect of the instrument, to take into consideration the particular circumstances of the trust.

10. *In what cases the trust estate will pass by a general devise.* — Whether a trust estate shall pass inclusively in a *general devise*, is a question that has been frequently under discussion,¹ [and notwithstanding the change in the law introduced by the Conveyancing and Law of Property Act, 1881 (c), is still a question of importance where the death

(a) *Fausset v. Carpenter*, 2 Dow. [(b) 44 & 45 Vict. c. 41, s. 30, and
& Cl. 232; 5 Bligh, N. S. 75; and see *ante*, p. 222.]
see *St. Leonards' H. L. Cases*, 76; [(c) 44 & 45 Vict. c. 41, s. 30.]
Re Waley's Trust, 3 Eq. R. 380.

¹ *Devise of trust estates.* — “A general devise of real estate will pass estates vested in the testator as trustee or mortgagee, unless a contrary intention can be collected from the expressions of the will, or from the purposes or limitations to which the devised lands are subjected”; Hill on Trustees, 283; and this is the general rule in America; *Ballard v. Carter*, 5 Pick. 112; *Richardson v. Woodbury*, 43 Me. 206; *Taylor v. Benham*, 5 How. 270; *Hughes v. Caldwell*, 11 Leigh, 342; *Jackson v. Delancy*, 13 Johns. 537; a devise of all one's estate passes trust property; *Bangs v. Smith*, 98 Mass. 273; *Willard v. Ware*, 10 Allen, 263; *Stone v. Hackett*, 12 Gray, 227; so a devise to one, his heirs

of the trustee occurred prior to the commencement of that act.] The rule as originally established was, that a general expression would carry a dry trust estate (*d*), but afterwards there were some misgivings upon the subject (*e*) (1); and the Court at last acceded to the proposition, that general words would *not* pass trust estates, unless there appeared a positive *intention that they should so pass (*a*). The question was reconsidered before Lord Eldon, when the result of the cases, after a careful examination of them, was declared to be, that, *where the will*

(*d*) *Marlow v. Smith*, 2 P. W. 198.

(*a*) *Attorney-General v. Buller*, 5

(*e*) See *Braybrooke v. Inskip*, 8 Ves. 340.
Ves. 437.

(1) **How the opinion arose that a general devise would not pass a trust estate.**—The doubt appears to have originated in part from an expression of Lord Hardwicke in *Casborne v. Scarfe*, 1 Atk. 605, that by a devise of all lands, tenements and hereditaments, a mortgage in fee would not pass, unless the equity of redemption were foreclosed. But Lord Hardwicke was not speaking here of the legal estate, but of the beneficial interest in the mortgage. The same thing was said in the same sense in *Strode v. Russel*, 2 Vern. 625. Lord Hardwicke's authority has been cited on both sides of the question (compare *Duke of Leeds v. Munday*, 3 Ves. 348, with *Ex parte Sergison*, 4 Ves. 147;) but that he approved of the old rule is evident from *Ex parte Bowes*, cited in Mr. Sanders's note to *Casborne v. Scarfe*, 1 Atk. 605. Lord Northington and Lord Thurlow are said to have entertained the same opinion. (See *Ex parte Sergison*, 4 Ves. 147; but, as to Lord Thurlow, see an *obiter dictum*, *Pickering v. Vowles*, 1 B. C. C. 198.)

and assigns, to and for his and their use and benefit; *Abbott*, Petr. 55 Me. 580; mortgage estates may pass by devise, though charged with debts and legacies; *Ballard v. Carter*, 5 Pick. 112; *Richardson v. Woodbury*, 43 Me. 206; whether the devisee or an heir can execute a trust depends upon the instrument as showing the settlor's intention; *Abbott*, Petr. 55 Me. 580; in some states the court appoints new trustees, if the original trustees die; *Hawley v. Ross*, 7 Paige, 103; *Clark v. Crego*, 47 Barb. 599; *Hook v. Dyer*, 47 Mo. 241; *McDougald v. Carey*, 38 Ala. 320; contra in New Jersey; *Schenck v. Schenck*, 16 N. J. Eq. 174; a trust estate cannot be divided; *Baldwin v. Humphrey*, 44 N. Y. 609; *Saunders v. Schmaelzle*, 49 Cal. 59; the survivor of the trustees, then the heir or representative, receives the trust estate; *Whiting v. Whiting*, 4 Gray, 236; *Webster v. Vandeventer*, 6 Gray, 429; *Powell v. Knox*, 16 Ala. 364; *De Peyster v. Ferrers*, 11 Paige, 13; *Gray v. Lynch*, 8 Gill. 404; *Keister v. Howe*, 3 Ind. 288; the surviving trustee cannot be disturbed by the representatives of his cotrustees; *Shook v. Shook*, 19 Barb. 653; he may sue by himself; *Richeson v. Ryan*, 15 Ill. 13; and his executors or administrators may continue the proceedings; *Maudlin v. Armistead*, 14 Ala. 702; *Nichols v. Campbell*, 10 Gratt. 561; but actions must be in the names of the parties to the contract; *Childs v. Jordan*, 106 Mass. 323; *Farrelly v. Ladd*, 10 Allen, 127.

contained words large enough, and there was no expression authorising a narrower construction, or any such disposition of the estate as it was unlikely a testator would make of property not his own (as complicated limitations, or any purpose inconsistent with as probable intention to devise as to let it descend), in such a case the trust estate would pass (b).

[A residuary devise to trustees upon trust to sell will pass the legal estate in a property which the testator has in his lifetime contracted to sell (c).]

11. **Charge of debts, &c., will exclude the trust estate.**—A charge of debts, legacies, annuities, &c., and *à fortiori*, a direction to *sell*, is considered a sufficient indication of an intention not to include a mere trust estate (d); as where a testator having a trust estate and also estates of his own, gave and devised “all his real estate, whatsoever and where-soever, to G. T., her heirs and assigns, for ever, charged with 50*l.* to his friend W.,” it was held that the trust estate did not pass (e). And so where a testator gave, devised, and bequeathed to trustees all such real estates as were then vested in him by way of mortgage, the better to enable his said trustees to recover, get in, and receive the principal monies and interest which might be due thereon, it was ruled that the devise extended only to mortgages vested in the testator beneficially, and did not pass the legal estate in fee vested in the testator *upon trust* for another (f).

(b) *Braybroke v. Inskip*, 8 Ves. 436; see *Roe v. Reade*, 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; *Langford v. Auger*, 4 Hare, 313.

[(c) *Surrey Commercial Dock Company v. Kerr*, W. N. 1878, p. 163.]

(d) *Roe v. Reade*, 8 T. R. 118; *Duke of Leeds v. Munday*, 3 Ves. 348; *Attorney-General v. Buller*, 5 Ves. 339; *Ex parte Marshall*, 9 Sim. 555; *Ex parte Morgan*, 10 Ves. 101; *Sylvester v. Jarman*, 10 Price, 78; *Re Morley's Trust*, 10 Hare, 293; [*Re Smith's Estate*, 4 Ch. D. 70; *Re Bellis's Trusts*, 5 Ch. D. 504;] see *Wall v. Bright*, 1 J. & W. 494; [see, however, *Re Brown & Sibly's contract*, 3

Ch. D. 156, where V. C. Malins was of opinion that where there was a general devise of real estate charged with debts and legacies, the legal estate in trust property would pass, notwithstanding the charge, which attached only on property which the testator was competent to charge with debts and legacies; and see as to this case *Re Bellis's Trusts*, *ubi sup.*]

(e) *Rackham v. Siddall*, 16 Sim. 297, 1 Mac. & G. 607; *Hope v. Liddell*, 21 Beav. 183; *Life Association of Scotland v. Siddall*, 3 De G. F. & J. 58.

(f) *Ex parte Morgan*, 10 Ves. 101; and see *Sylvester v. Jarman*, 10

12. What expressions will or will not exclude the trust estate. — The expression “*my* real estates” will not restrict the meaning to those vested in the testator beneficially (*g*), nor will a *devise to A., his heirs and assigns, “to and for *his and their own use and benefit*” (*a*), nor a devise to A. and her heirs, to be disposed of by her by will or otherwise, as she may think fit (*b*): though under a devise to a woman for her *separate use*, as the words import a beneficial enjoyment, a dry legal estate will not pass (*c*); but a devise to a woman, “her heirs and assigns, for her and *their* own sole and absolute use,” expresses only the absolute interest, and does not create a separate estate (*d*). Whether a residuary devise of lands to persons as tenants in common in *equal shares*, will pass a trust estate, has never been expressly decided, but a judicial opinion has been expressed that such a devise would not pass a dry trust estate (*e*). A devise to the testator’s *nephews and nieces* share and share alike as tenants in common, and not as joint-tenants, as the class is unascertained at the date of the will, does not pass a trust estate (*f*). And if the devise be for A. for life or in tail, with remainders over, in strict settlement, the trust estate will not pass (*g*). “Where there is a limitation of real estate,” said Lord Eldon, “in strict settlement, with a vast number of limitations, contingent remainders, executory devises, powers of jointuring, leasing, and raising sums of money, it is impossible to say the intention could be to give a dry trust estate” (*h*).

Price, 78; *Ex parte Brettell*, 6 Ves. 577.

(*g*) *Braybroke v. Inskip*, 8 Ves. 425.

(*a*) *Ex parte Shaw*, 8 Sim. 159; *Bainbridge v. Lord Ashburton*, 2 Y. & C. 347; *Sharpe v. Sharpe*, 12 Jur. 598; and compare *Ex parte Brettell*, 6 Ves. 577, with *Braybroke v. Inskip*, 8 Ves. 434.

(*b*) *Ex parte Shaw*, 8 Sim. 159.

(*c*) *Lindsell v. Thacker*, 12 Sim. 178. The marginal note of the Report is quite contrary to the decision.

(*d*) *Lewis v. Mathews*, 2 L. R. Eq. 177.

(*e*) *Martin v. Laverton*, 9 L. R. Eq. 568, per V. C. Malins; and see cases there referred to; [*Re Morley's Trust*, 10 Hare, 293.]

(*f*) *Re Finney's Estate*, 3 Giff. 465.

(*g*) *Thompson v. Grant*, 4 Madd. 438; *Re Horsfall*, 1 Maclel. & Younge, 292; *Galliers v. Moss*, 9 B. & C. 267; *Ex parte Bowes*, cited in Mr. Sanders's note to *Casborne v. Scarfe*, 1 Atk. 603.

(*h*) *Braybroke v. Inskip*, 8 Ves. 434.

13. *Distinction as to legal estate in mortgages.*—The question whether the legal estate in a *mortgage in fee* passes by a general devise in the will of the mortgagee, stands on a different footing. The mortgagee has a *beneficial* interest in the property as a security, a distinction not always sufficiently adverted to, but which is strongly in favour of the legal estate passing to the person who is to receive the mortgage money (i). It is clear that the legal estate passes by a general devise of *securities for money* (j), and neither a general trust to sell and convert (k), nor a *charge [*229] of debts (a), will prevent it from so passing. And it is conceived, notwithstanding a former decision of the Court of Exchequer (b), that the case of a *general devise and bequest* of real and personal estate charged with debts or legacies admits of no substantial distinction (c). But the legal estate will not pass by a general devise of real estate, if there be *special trusts* for sale or other limitation, &c., which would be inapplicable to an estate in mortgage (d).

[*Distinction now not material.*—The distinction between mortgaged estates and trust estates has ceased, in the case of the mortgagee or trustee dying after the 31st December, 1881, to be material; as in either case the power of disposing of the legal estate is now vested in the personal representatives of the mortgagee or trustee so dying (e).]

14. *Power of a trustee in equity to devise the trust estate.*—The rule that trust estates passed under a general devise assumed that a testator by making such a devise did not

(i) *Doe v. Bennett*, 6 Exch. 892; and comments of Vice Chancellor Kindersley on this case, *Re Cantley*, 17 Jur. 124; [and see *Heath v. Pugh*, 6 Q. B. D. 345, 360.]

(j) *King's Mortgage*, 5 De G. & Sm. 644, and cases there reviewed; *Knight v. Robinson*, 2 K. & J. 503; *Rippen v. Priest*, 13 C. B. N. S. 308; *Ex parte Whitacre*, cited 1 Sand. Uses and Trusts, 359, 4th edition.

(k) *Ex parte Barber*, 5 Sim. 451; *Mather v. Thomas*, 6 Sim. 115.

(a) *Field's Mortgage*, 9 Hare, 414;

overruling *Renvoize v. Cooper*, 10 Price, 78.

(b) *Doe v. Lightfoot*, 8 M. & W. 553.

(c) Now so decided. *Re Stevens' Trusts*, 6 L. R. Eq. 597; [*In re Brown and Sibly's Contract*, 3 Ch. D. 163.] But see *In re Packman and Moss*, 1 Ch. D. 214.

(d) *Re Cantley*, 17 Jur. 124; *Martin v. Laverton*, 9 L. R. Eq. 563; *Thirtle v. Vaughan*, 24 L. T. 5; *Re Finney's Estate*, 3 Giff. 465; [*Re Smith's Estate*, 4 Ch. D. 70.]

[(e) 44 & 45 Vict. c. 41, s. 30.]

commit a breach of trust, otherwise general words would not have been construed to carry the trust estate (*f*). However, it was observed in one case by the late Vice-Chancellor of England that in his opinion it was not lawful for a trustee to dispose of the estate, but that he ought to permit it to descend; and that there was no material difference between a conveyance *inter vivos* and a devise, for the latter was nothing but a *post mortem* conveyance (*g*). But Lord Langdale considered that there was a wide distinction between a conveyance in the trustee's lifetime and a devise by his will; for during his life he had a personal discretion confided to him, which he could not delegate, but the settlor could not have reposed any personal confidence in the trustee's heir, for it could not be known beforehand who such heir would be; and that if the estate were allowed to descend, it might become vested in married women, infants, or bankrupts, or persons out of the jurisdiction; and he could not therefore hold it to be a breach of trust to transmit the estate by will to trustworthy devisees (*h*). [But this question has since the recent [*230] alteration in the law under which the trust *estate devolves as a chattel real ceased to be one of practical interest.]

15. **Whether a devisee can execute the trust.**—How far a *devisee* of the trust estate can execute the trust, will depend on the intention of the settlor, to be collected from the terms in which the instrument is expressed. Thus, real or personal estate *may* be so vested in A. that A. alone shall *personally* execute the trust; and in such a case, the *heir* or *executor* of A. though he took the legal estate, could not act as trustee (*a*); and *à fortiori* in such a case the *devisee*, though made the depositary of the legal estate, would have no authority to execute the trust (*b*). [It was laid down in former editions of this work that] if a settlor vested an

(*f*) See *ante*, p. 226, and the authorities cited in note (*a*) *Ib*.

(*g*) *Cooke v. Crawford*, 13 Sim. 98; and see *Beasley v. Wilkinson*, 13 Jur. 649.

(*h*) *Titley v. Wolstenholme*, 7 Beav. 435; and see *Macdonald v. Walker*,

14 Beav. 556; *Wilson v. Bennett*, 5 De G. & Sm. 479.

(*a*) See *Mortimer v. Ireland*, 11 Jur. 721.

(*b*) *Mortimer v. Ireland*, 11 Jur. 721; S. C. before Vice-Chancellor Wigram, 6 Hare, 196.

estate in A. upon trust, that A. and his *heirs* should sell, and A. devised the estate, neither the heir nor devisee could sell; not the *heir*, for as regards this estate the descent had been intercepted and there was no heir, and not the *devisee*, for he was not the person to whom the execution of the trust was committed (*c*). [This proposition was founded upon *Cooke v. Crawford*, and subsequent cases, but in the recent case of *Osborne to Rowlett* (*d*), the late M. R. after an elaborate discussion of the cases came to the conclusion that *Cooke v. Crawford* was wrongly decided, and he held that where real estate was devised to trustees and their heirs, in trust for sale, the trust was annexed to the estate, and that as the surviving trustee might have lawfully devised the trust estate the devisee might execute the trust, and he expressly overruled *Cooke v. Crawford*. In a subsequent case, however, before the Court of Appeal (*e*), in which the precise point did not arise, L.JJ. James, and Baggallay, expressed a doubt whether *Osborne to Rowlett*, was rightly decided, and the question must in the present state of the authorities be considered as an open one. It may be observed that M. R. justified his decision on the ground that the decision in *Cooke v. Crawford*, was, in his opinion, based on the assumed principle that a trustee unless authorized so to do, could not lawfully devise the trust estate, and that as that principle has been overruled by subsequent cases, *Cooke v. Crawford*, has ceased to be a binding authority, but it is submitted that the real ground for the decision in *Cooke v. Crawford*, was that the authority to execute the trust *must be [*231] directly given by the original settlor or testator, and that the surviving trustee by devising the estate to a person not so authorized did not enable the devisee to execute the trust (*a*). It is submitted that this principle has not been called in question, whatever exceptions have been taken to the observations in *Cooke v. Crawford*, as to the duty of a

(*c*) *Cooke v. Crawford*, 13 Sim. 91; Ch. D. 143; and see *Re Ingleby and Wilson v. Bennett*, 5 De G. & Sm. 475; *Stevens v. Austen*, 7 Jur. N. S. 873; 3 E. & E. 685. Ch. D. 143; and see *Re Ingleby and Boak &c. Insurance Company*, 13 L. R. Ir. 326.]

[(*d*) 13 Ch. D. 774.]

[(*a*) See Sugd. V. & P. 14th Ed. p. 665.]

[(*e*) *Re Morton and Hallett*, 15

trustee to let trust estates descend, and that however strong the argument might be (if the matter were one of first impression) in favour of holding that the trust may be executed by any person to whom the estate comes consistently with the provision of the original settlement or will, it is too late now to overrule *Cooke v. Crawford*, and the subsequent cases, and to introduce a new principle. And in a subsequent case in Ireland where a testator appointed A. and B. executors and trustees of her will, and devised real estate to them upon trust, that they or the survivor should pay the rents to A. for his life, and after his death sell the estate, it was held that the executors of B., who survived A., could not make a title, notwithstanding the 30th section of the Conveyancing and Law of Property Act, 1881 (b).]

16. *Re Burt's estate*.—In another case (c), where leaseholds were assigned to two trustees, *their executors and administrators*, upon trust; and the surviving trustee devised the leaseholds to A. and B. *upon the same trusts*, and appointed A. B. and C. *executors*; on a petition by A. and B. to the Court to have the trust fund, the proceeds of the leaseholds, paid out to them, Vice-Chancellor Kindersley refused, observing, that the surviving trustee had no authority to bequeath the execution of the trust, but could only pass the legal estate. The petition was then amended by joining C. as a co-petitioner, so that the petition was now that of the legatees, and also of the *executors*; but the Vice-Chancellor still refused, on the ground that the testator had himself declared, that his executors as such should not be trustees, and, therefore, since, by the bequest, he had taken the legal estate from those who ought to have been trustees, there must be an appointment of new trustees.

17. *Where the trust is confided to the trustee and his assigns*.—But it most frequently happens that an estate is vested in A. upon trust, that A., his heirs, executors, administrators, and *assigns*, shall hold upon the trust; and the question then is, whether a *devisee* of A. may, as falling under the description of *assigns*, not only take the estate, but also execute the

[(b) *Re Ingleby and Boak, &c. Insurance Company*, 13 L. R. Ir. 326.]

(c) *Re Burt's Estate*, 1 Drew. 319.

trust? In *Titley v. Wolstenholme* (d), where the settlement contained no power of *appointment of [*232] new trustees, it was held, that as a conveyance in the lifetime of the trustee to a stranger would have been a breach of trust, the word assign could mean only a devisee taking under a *post mortem* conveyance, when the personal confidence in the trustee necessarily ceased; and consequently that the devisees had not only the legal estate, but were properly trustees within the scope of the settlor's intention.

18. *Titley v. Wolstenholme*, doubted. — This case seems to have raised some scruple in the mind of V. C. afterwards L. J. Knight Bruce, for he observed that "What he should have done if *Titley v. Wolstenholme* had come before him he need not say, nor was he sure" (a). And the reasoning upon which Lord Langdale proceeded is not quite conclusive, for the word "*assigns*" does not necessarily imply a devise, as it would be satisfied by holding it to refer to a tenant by the curtesy or dowress, who would be assigns in law. However, the case was referred to, without disapprobation, by Lord Cottenham (b), and was approved by V. C. Stuart (c).

19. *Hall v. May*. — In *Hall v. May* (d), V. C. Wood went further, and held that under a trust containing the word *assigns*, and also a power to appoint new trustees, the devisee could make a title. It was conceded that the word "*assigns*" would not have enabled a trustee to transfer the trust by act *inter vivos*, and it could not be disputed that, as the instrument contained a power of appointment of new trustees, the assigns introduced by virtue of the power would give a meaning to the word "*assigns*" without having recourse to a devise. It was therefore necessary to lay down a broader principle than that acted upon in *Titley v. Wolstenholme*, and the doctrines upon which the Vice-Chancellor proceeded

(d) 7 Beav. 425. See *Saloway v. Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594, which however was the case of a mortgage.

(a) *Ockelston v. Heap*, 1 De G. & Sm. 642.

(b) *Mortimer v. Ireland*, 11 Jur. 721.

(c) *Ashton v. Wood*, 3 Sm. & G. 436.

(d) 3 K. & J. 585.

appear to have been substantially these—"That a settlor must have intended to provide a permanent machinery for the execution of the trust; that he could not have reposed any personal confidence in the trustee's heir, who was unknown, and could not be ascertained beforehand; that the settlor must have contemplated the possibility that on the death of the trustee the heir might be an infant, or lunatic, or bankrupt, or insolvent, and so either incapable or unfit to discharge the office; that it might therefore be reasonably inferred that the settlor meant by confiding the trust to the trustee, his heirs and *assigns*, to give the trustee a discretionary power of preventing these inconveniences by [*238] vesting the estate in a devisee; *and that the circumstance that the settlor had given to the surviving trustee a power of appointing new trustees by *deed*, rather favoured the view that he also intended, when using the word 'assigns,' to confer on the trustee a right to devise the trust estate." The Court was also actuated by the feeling that many titles must have been accepted upon the footing of this enlarged construction. The decision was perhaps a bold one, but having been made it is not likely to be disturbed.

[20. **Sale by heir.**—Where a testator devised freehold and copyhold estates to trustees and their heirs upon trust that they "his said trustees or the trustees or trustee for the time being of that his will" should sell the estates, it was held that the copyhold heir of the surviving trustee to whom the estates had descended could execute the trust (*a*).

21. **44 & 45 Vict. c. 41.**—Where under the 30th sect. of the Conveyancing and Law of Property Act, 1881, trust or mortgage estates become vested in the personal representatives of a trustee or mortgagee, they are for the purposes of the section to "be deemed in law his heirs and assigns within the meaning of all trusts and powers." The wording of this section is not clear, but it is conceived that it enables the personal representatives to execute the trusts and powers which were originally reposed in the trustee, his heirs and

assigns, and they may therefore sell in any case where there was a trust for sale or power of sale in the heirs and assigns of the last surviving trustee.]

22. **An estate contracted to be sold will be included in a general devise.**—A vendor, after the contract for sale, but before the completion of it, is a trustee for the purchaser *sub modo* only, and the estate will pass by a general devise in his will, where it would not have been included had the testator been a mere and express trustee (b).

[**Personal representative can convey.**—But by the Conveyancing and Law of Property Act, 1881, s. 4, it is enacted that where at the death of any person there is subsisting a contract *enforceable against his heir or devisee* for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his personal representatives shall, by virtue of the Act, have power to convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract. But a conveyance made under this section is not to affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate, and the section applies only in cases of death after the 31st December, 1881" (c).]

* 23. **Trustee has the privileges and burdens of [*234] the legal estate.**—As the dry legal estate in the hands of the trustee is [subject to the statutory modifications above referred to] affected by the operation of law, and may be disposed of by the act of the trustee, precisely in the same manner as if it were vested in him beneficially, so it confers upon him all the *legal* privileges, and subjects him to all the *legal* burdens, that are incident to the usufructuary possession (a).

Trustee must bring actions, &c.—Thus the trustee can bring any action respecting the trust estate in a court of law, the *cestui que trust*, though the absolute owner in

(b) Wall v. Bright, 1 J. & W. 494;

but see now Lyssaght v. Edwards, 2 Ch. D. 499.

[(c) Cf. Sect. 30 of the same Act 44 & 45 Vict. c. 41.]

(a) Burgess v. Wheate, 1 Eden, 251, per Lord Northington.

equity, being at law regarded in the light of a stranger (*b*). So the trustee of a manor is the person to appoint the steward of it (*c*), and the trustees of an advowson to present to the church (*d*), but in either case he has the mere *legal right*, and is bound in *equity* to observe the directions of his *cestui que trust* (*e*).

24. **Trustee must prove in bankruptcy.** — So where a debtor to the trust estate becomes bankrupt, the trustee may prove for the debt, and that without the concurrence of the *cestui que trust* (*f*), unless it be such a simple trust as where A. is trustee for B. absolutely, and then it rests in the discretion of the judge to require the concurrence of the *cestui que trust*, for who knows but that B. may have already received the money (*g*).

Case of trustee a bankrupt. — If the *trustee* himself become bankrupt a *cestui que trust* may obtain an order to prove for the whole sum and will be entitled to vote at the choice of the creditors' trustee (*h*). A mere trustee of a debt for a person absolutely entitled and under no disability, cannot present a bankruptcy petition against the debtor without the concurrence of his *cestui que trust*; for as the *cestui que trust* who was competent to do so might have released the debt, "it might well happen that there was no real debt at all, although in legal parlance there might be a debt;"¹ and it makes no difference that the trustee has obtained final judgment against the debtor for the amount, and has served a

(*b*) See *Allen v. Imlett*, Holt, 641; *Gibson v. Winter*, 4 B. & Ad. 96; *May v. Taylor*, 6 M. & Gr. 261. But see now 36 & 37 Vict. c. 66.

(*c*) *Mott v. Buxton*, 7 Ves. 201; and see *Cary*, 14.

(*d*) See *Re Shrewsbury School*, 1 M. & Cr. 647; *Hill v. Bishop of London*, 1 Atk. 618.

(*e*) *Attorney-General v. Parker*, 3 Atk. 577, per Lord Hardwicke; *Attorney-General v. Forster*, 10 Ves. 338, per Lord Eldon; *Attorney-General v. Newcombe*, 14 Ves. 7, per

eundem; *Kensley v. Langham*, Cas. t. Talb. 144, per Lord Talbot; *Amburst v. Dawling*, 2 Vern. 401; *Barret v. Glubb*, Sir W. Black. Rep. 1063, per De Grey, J.; and see *post*.

(*f*) *Ex parte Green*, 2 D. & Ch. 116, per Cur.

(*g*) *Ex parte Dubois*, 1 Cox, 310; and see *Ex parte Battier*, Buck, 426; *Ex parte Gray*, 4 D. & Ch. 778; [*Ex parte Culley*, 9 Ch. D. 307.]

(*h*) *Ex parte Cadwallader*, 4 De G. F. & J. 499.

¹ *Ex parte Culley*, 9 Ch. D. 307; *Ex parte Dearle*, 14 Q. B. D. 184, 191.

bankruptcy notice on the debtor under sect. 4, subsect. (g) of the Bankruptcy Act, 1883.¹ But the trustee can serve a good bankruptcy notice without the concurrence of the *cestui que trust*.²

25. **Trustee if in possession votes for coroners.**—The trustee as the legal proprietor had originally the right of voting for *coroners* (i) (1); but by 58 G. 3, c. 95, sect. 2, it was transferred to the *cestui que trust* in possession. This act, however, * has since been repealed (a), and the [*235] matter now stands as it did before any legislative interference (b).

26. **Trustee's right to vote for a member of parliament.**—So the trustee was the person entitled at *common law* to vote for *members of parliament* (c). But by the 74th section of 6 & 7 Vict. c. 18 (d), it is enacted, that "no trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but that the *cestui que trust* in actual possession or in the receipt of the rents and profits thereof, *though he may receive the same through the hands of the trustee*, shall and may vote for the same notwithstanding such trust," and by the 5th section of 30 & 31 Vict. c. 102, the right of voting is conferred upon persons who are seised at law or *in equity*, of lands or tenements of the yearly value of five pounds. [But a person entitled to a share of the proceeds of the sale of real estate held on a trust for conversion has not such an estate as will entitle him to vote (e).]

(i) *Burgess v. Wheate*, 1 Eden, 251.

(a) 7 & 8 Vict. c. 92.

(b) *Regina v. Day*, 2 Ell. & Bl. 859; see *post*, Ch. xxvi, s. 1.

(c) *Burgess v. Wheate*, 1 Eden, 251, *per* Lord Northington.

(d) As to the effect of certain intermediate statutes see 3d Ed. p. 270.

[(e) *Spencer v. Harrison*, 5 C. P. D. 97.]

(1) And Lord Northington added for "sheriffs" (*Burgess v. Wheate*, 1 Eden, 251) but the election of sheriffs had been transferred from the people to the Chancellor, Treasurer, and Judges, by 9 E. 2, st. 2, before the establishment of trusts.

¹ *Ex parte Dearle*, 14 Q. B. D. 184.

² *Ibid.*

27. *Trustees liable to rates.* — Again, trustees are liable to be *rated* for the property vested in them (*f*), unless they are trustees *exclusively* for public purposes without any profit to themselves or a particular class, as trustees of court houses, prisons, or the like (*g*).

28. *Trustee pays the fine on admission to copyholds.* — The trustee of a *copyhold* must pay a fine on his admission (*h*), but as the fine follows the admission the lord cannot refuse admission until the fine is paid (*i*); and on the decease of a trustee a heriot becomes due to the lord (*j*); and where the trustee died intestate, and the customary heir *before admission* devised the estate, the lord was held to be entitled to a double fine on the admission of the devisee, as it carried with it also the admission of the devisor (*k*). But where a trustee died intestate, and the Court under the Trustee Acts appointed a new trustee in the place of the deceased trustee, and the lord demanded two fines, one for the admission of the customary heir of the old trustee, and another for the admission of the new trustee, it was held that he could claim

but one fine, viz., for the admission of the new trustee [**236*] (*l*); * and where two or more trustees have been admitted *jointly*, on the decease of *one* neither fine nor heriot is due; not a fine for admission, because, joint tenants being seised *per my et per tout*, the estate is vested in the survivors or survivor by the original grant, and not a heriot, because, however many in number the trustees may be, they all form but one tenant to the lord, and therefore no heriot is demandable until the death of the longest liver (*a*). [Now on the death of a trustee of copyholds they vest in his legal personal representatives (*b*), who must pay the ordinary

(*f*) *Regina v. Sterry*, 12 Ad. & Ell. 84; *Queen v. Stapleton*, 4 B. & S. 629.

(*g*) *Regina v. Shee*, 4 Q. B. 2; *Mayor of Manchester v. Overseers of Manchester*, 17 Q. B. 859; *Queen v. Harrogate Commissioners*, 15 Q. B. 1012.

(*h*) *Earl of Bath v. Abney*, 1 Dick. 260; *S. C.* 1 Burr. 206.

(*i*) *Regina v. Wellesley*, 2 Ell. & Bl. 924.

(*j*) *Trinity College v. Browne*, 1 Vern. 441; see *Car v. Ellison*, 3 Atk. 77.

(*k*) *Lord Lonsborough v. Foster*, 3 B. & S. 805.

(*l*) *Bristow v. Booth*, 5 L. R. C. P. 81.

(*a*) See 2 Watk. Cop. 147.

[(*b*) 44 & 45 Vict. c. 41, s. 30; *Re Hughes*, W. N. 1884, p. 53.]

finer on their admission.] If a copyhold be devised to trustees for *five hundred years* on certain trusts, with remainder to A. B. in fee, and the lord admits A. B. not as remainderman, but as a present tenant and upon payment of a full fine, the lord has a perfect tenant, and cannot compel the *termors* to be admitted (*c*). The Court in this case adverted to several points of practical importance, which are worth noticing. Thus: 1. It is commonly said that an admission is void, except so far as it follows the uses of the surrender or will; but the Court held that the excess of the admission is void only as against the parties interested, and that the lord may be estopped by his own act. 2. Where the termors have been admitted, the lord may require the admission of the executor of the last survivor, for the lord is entitled to a tenant or to possession. 3. The admission of the tenant for life or for years is a constructive admission of the remainderman, but such an admission does not disentitle the lord to call for a subsequent admission of the remainderman, where the custom of the manor gives the lord a fine in respect of the remainder. 4. The lord is not bound to admit a remainderman, but if he do admit him *as such remainderman* although this admission may be a constructive admission of the particular estate, the lord may afterwards require the tenant for life or years to be admitted for the purposes of a new fine.

Principle on which the fine is assessed. — Where a number of trustees are admitted as the joint owners of the trust estate, the fine is to be assessed upon the following principle; for the first life is to be allowed the fine usually paid on the admission of a single tenant, for the second life one-half the sum taken for the first, and for the third one-half the sum taken for the second, &c.; the result of which will be, that, however great the number of the trustees admitted, the amount of the whole fine will never be double of that paid upon the first life (*d*). And on every *change [*237] of trustees the same fine is demandable, even where some of the surrenderees are the survivors of the old trus-

(c) *Everingham v. Ivatt*, 7 L. R. Q. B. 683; affirmed 8 L. R. Q. B. 388.

(d) *Wilson v. Hoare*, 2 B. & Ad. 360, see 360; 10 Ad. & Ell. 236, and 1 Scriven, Copyh. 164, 165, 6th edit.

tees, for they take a new estate (*a*). In order to avoid these onerous fines, where the estate devolves on several trustees, all the trustees but one may disclaim or release to that one, who can then be admitted, and the lord can then claim only a single fine (*b*). But there may be some risk in adopting this course otherwise than with the sanction of the Court, since to vest the legal estate in one trustee alone must in strictness be viewed as a breach of trust, and the expected pecuniary advantage might, by the early death of the trustee who is admitted in the lifetime of his co-trustees, be turned into a loss, and then the trustees might be held liable for the detriment to the trust estate. The last contingency might be guarded against by an insurance, effected either at an annual premium or for a gross sum payable in advance. But besides this, where discretionary powers are annexed to the trusteeship, the severance of the estate from the ordinary devolution of the *trust* might affect the powers; as, if a power of sale be given to the *heir* of the *survivor*, and A. is admitted and B. survives, can the heir [or legal personal representative (*c*)] of B. sell? (*d*).

Disclaimer to avoid a fine.—Where a copyhold has been surrendered to several trustees, there can be no disclaimer by one trustee, for the purpose of vesting the entire estate in the co-trustees, where that one trustee, by having acted as owner, has virtually accepted the estate (*e*). And where a testator devised to three trustees, whom he appointed executors, and one disclaimed and the two others proved the will, but, wishing to escape the double fine, put forward the heir to be admitted as the person upon whom the estate descended until the devisees were admitted, it was held that the lord was justified in refusing to admit the heir; and the Court, in the exercise of its discretionary power, would not issue a mandamus to compel him (*f*). But in the same case,

(*a*) Sheppard v. Woodford, 5 M. & W. 608; but see Wilson v. Hoare, 10 Ad. & Ell. 236.

(*b*) Wellesley v. Withers, 4 Ell. & Bl. 750; and see Paterson v. Paterson, 2 L. R. Eq. 31; S. C. 35 Beav. 506; *Re Flitcroft*, 1 Jur. N. S. 418.

[(*c*) See 44 & 45 Vict. c. 41, s. 30; and see *ante*, p. 233.]

(*d*) Wilson v. Bennett, 5 De G. & Sm. 475.

(*e*) Bence v. Gilpin, 3 L. R. Ex. 76.

(*f*) Queen v. Garland, 5 L. R.

the lord having made the usual proclamation, and the heir having tendered himself for admission, and the lord having refused to admit him on the ground that the estate was in the devisees, who refused to come in, it was ruled that, as the devisees had no title until admittance and the estate descended * to the heir, the lord was not justified in seizing for want of a tenant (*a*).

29. **Reimbursement.** — Though the manorial burdens in respect of copyholds fall upon the trustee personally at law, he is of course entitled in equity to reimburse himself the expenditure out of the trust estate (*b*).

30. **Trustee of leaseholds.** — The trustee of a *leasehold* estate is liable upon the covenants of the lease just as if he were the real owner (*c*).¹ But the trust estate must indemnify him in equity. [It is the duty of a trustee of leasehold property to keep it free from the risk of forfeiture; and for that purpose he is entitled to have the covenants in the lease performed out of the rents of the property, and is not bound to be satisfied with an indemnity against the consequences of a breach of the covenants. And where a tenant for life of leasehold houses had been allowed by the trustees to receive the rents and profits, and the houses had not been kept in a proper state of repair, the Court, at the instance of one of the trustees, appointed a receiver (*d*).]

31. **If trustee trade in that character, he is amenable to the bankrupt laws.** — If a trustee carry on a *trade* in the due execution of his trust, he makes himself amenable to the operation of the bankrupt law in the same manner as if he had traded on his own account (*e*), and the debts contracted by him in such trade are not debts of the testator, but his own

Q. B. 269; [and see now 44 & 45 Vict. c. 41, s. 30.]

(*a*) *Garland v. Mead*, 6 L. R. Q. B. 441.

(*b*) *Rivet's case*, Moore, 890.

(*c*) *White v. Hunt*, 6 L. R. Ex. 32.

[(*d*) *Re Fowler*, 16 Ch. D. 723.]

(*e*) *Wightman v. Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves.

119, *per* Lord Eldon; *Hankey v. Hammond*, cited in marginal note to 1 Cooke's Bank. Law, 84, 3d ed.; and see *Re Phoenix Life Insurance Company*, 2 J. & H. 229; *Lucas v. Williams*, No. 1, 4 De G. F. & J. 436; *Farhall v. Farhall*, 7 L. R. Ch. App. 123.

¹ *Greason v. Keteltas*, 17 N. Y. 491.

debts (*f*), and on his decease his lands, as those of a trader, were liable under Sir Samuel Romilly's Act (*g*) to the discharge of simple contract debts (*h*); and now, by 3 & 4 W. 4, c. 104, the lands of all persons, traders or otherwise, are liable to their simple contract debts; and by 32 & 33 Vict. c. 46, simple contract debts are payable *pari passu* with specialty debts. But an executor carrying on a business in pursuance of the directions of a will, is entitled to be indemnified out of the estate, as against all persons claiming under the will, though not as against creditors who claim paramount to the will (*i*).

[*239] *32. **Shares in companies.**—If trustees be holders of shares in a company, their liabilities are the same as if they were the beneficial owners, though the fact of their trusteeship be noticed in the company's book (*a*).

Secondly. Of the legal estate in the trustee with reference to the construction of particular statutes.

[1. **How the legal estate is affected by the bankruptcy of the trustee.**—By the Bankruptcy Act, 1883 (*b*), it is enacted, that "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge, shall, immediately on the debtor being adjudged bankrupt, vest in the trustee," and until a trustee is appointed, the official receiver is to be the trustee for the purposes of the Act.]¹

(*f*) *Farhall v. Farhall*, 7 L. R. Ch. App. 123; reversing S. C. 12 L. R. Eq. 98; *Owen v. Delamere*, 15 L. R. Eq. 134; [*Re Morgan*, 18 Ch. D. 93;] see *Hall v. Fennell*, 9 L. R. Eq. 615.

(*g*) 47 G. 3, c. 74. Repealed and re-enacted by 11 G. 4, & 1 Will. 4, c. 47.

(*h*) *Longuet v. Hockley*, Feb. 16, 1836, Exch. MS. See a short statement of this case at p. 273, note (*b*) of 3d edition; and see *Lucas v. Williams*, 3 Giff. 150.

(*i*) *Lucas v. Williams*, No. 2, 4 De G. F. & J. 439.

(*a*) *Re Phoenix Life Assurance Company*, 2 J. & H. 229; *Re Leeds Banking Co.*, *Fearnside's case*, *Dobson's case*, 12 Jur. N. S. 60; *Lumsden v. Buchanan*, 4 Macq. H. L. C. 960; *Imperial Mercantile Credit Association*, *Chapman and Barker's case*, 3 L. R. Eq. 361.

[(*b*) 46 & 47 Vict. c. 52, ss. 44, 54; and see the analogous sections 15 & 17 in the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71.]

¹ *Bankruptcy.*—Insolvency or bankruptcy of the trustee does not necessarily cause a change in the trustee; *Shryock v. Waggoner*, 28 Pa. St. 430; and

2. *Assignees take differently from heirs and executors.*—The operation of the Bankruptcy Acts was thus commented upon by Lord Chief Justice Willes:—“The assignees under a commission of bankruptcy, are not to be considered as *general assignees* of all the real and personal estate of which the bankrupt was seised and possessed, as *heirs* and *executors* are of the estate of their ancestors and testators, for nothing vests in the assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts” (c).

3. *The trust estate does not pass to the trustees in bankruptcy of the trustee.*—It is clear, therefore, that in the case of a *bare trust*, the property, whether real (d) or personal (e), did not vest by the bankruptcy in the assignees, even *at law*. And the proposition applies not only to *express trustees*, but also to *trustees virtute officii*, as executors, administra-

(c) *Scott v. Surman*, Willes, 402.

(d) *Ex parte Gennys*, 1 Mont. & Mac. 258; *Houghton v. Koenig*, 18 C. B. 235.

(e) See *Winch v. Keeley*, 1 T. R.

619; *Carpenter v. Marnell*, 3 B. & P.

40; *Gladstone v. Hadwen*, 1 M. & S.

517; *Boddington v. Castelli*, 1 Ell. &

Bl. 879; *Westoby v. Day*, 2 Ell. &

Bl. 605.

does not of itself change his fiduciary relation; *Belknap v. Belknap*, 5 Allen, 468. Where the trustee gives bonds, as he is generally required to in the United States, the financial standing of the trustee would seem to be a matter of minor importance, and would not affect the trust unless brought about by the misconduct of the trustee. Ordinarily, trustees cannot be relieved after beginning to act as such, without some sufficient cause shown; *Jones v. Stockett*, 2 Bland, 409; *Cruger v. Halliday*, 11 Paige, 314; *Craig v. Craig*, 3 Barb. Ch. 76; but where the trustee served for no definite time and gratuitously, it was held that he might be relieved at his convenience; *Bogle v. Bogle*, 3 Allen, 158; the expense of change of transfer falls on trustee when he is the cause of it; *In re Jones*, 4 Sandf. Ch. 615; *Howard v. Rhodes*, 1 Keen, 581, but see *Coventry v. Coventry*, 1 Keen, 758.

If an equitable life tenant becomes insolvent, the trustee holds his interest subject to his assignees; *Wells v. Ely*, 3 Stock. 172. Trust estates are sometimes limited to the bankruptcy of trustee or *cestui que trust*, so that the trusts are thereby terminated; *Commonwealth v. Stauffer*, 10 Barr. 350; *Stagg v. Beekman*, 2 Edw. Ch. 89; *Girard Ins. Co. v. Chambers*, 46 Pa. St. 485; *Maddox v. Maddox*, 11 Gratt. 804. Property cannot be settled on one's self with a limitation over if he becomes bankrupt; *Braman v. Stiles*, 2 Pick. 463; *Pope v. Elliott*, 8 B. Mon. 56; *Graff v. Bonnett*, 31 N. Y. 19. See note on assignments for the benefit of creditors.

tors (*f*), factors (*g*), &c.; and by the recent Bankruptcy Acts (*h*) it is *expressly* enacted that the bankrupt's [*240] *property shall not be taken to comprise property held by the bankrupt in trust for any other person.

4. **Nor the property into which the trust estate has been converted.**—Where the trust estate or fund has been converted into property of a different character, the new acquisition will equally be protected against the effects of the bankruptcy; for the product or substitute of the original thing must follow the nature of the thing from which it proceeded (*a*). Thus, if goods consigned to a factor be sold by him and reduced into money, so long as the money can be identified, as, where it has been kept in a bag, the employer, and not the creditors, will have the benefit of that specific sum (*b*). When money is said to have no *ear-mark*, the meaning is no more than this, that, being the currency of the country, it cannot be followed when once it has passed in circulation (*c*).

[5. **Harris v. Truman.**—So where money was paid into a bank by a firm of brewers, and an agent was allowed to draw upon the account in order to provide himself with funds for purchasing barley to be malted for the brewers, and the agent bought large quantities of barley, and also (although not authorised so to do) of malt, and drew largely upon the account, but in lieu of paying for the barley and malt, misappropriated the moneys which he received and subsequently became a bankrupt, it was held (1) that the moneys drawn out by the agent were impressed with a trust

(*f*) *Howard v. Jemmett*, 3 Burr. 1369, *per* Lord Mansfield; *Ex parte Butler*, 1 Atk. 213, *per* Lord Hardwicke; *Viner v. Cadell*, 3 Esp. 88; *Farr v. Newman*, 4 T. R. 629, *per* Grose J.; see *Ex parte Ellis*, 1 Atk. 101.

(*g*) *Godfrey v. Furzo*, 3 P. W. 186, *per* Lord King; *Tooke v. Hollingworth*, 5 T. R. 226, *per* Lord Kenyon; *L'Apostre v. Le Plaistrier*, cited *Copeman v. Gallant*, 1 P. W. 318; *Delauney v. Barker*, 2 Stark. 539; *Boddy v. Esdaile*, 1 Car. & P. 62; see *Ex parte Dumas*, 2 Ves. 582; S. C. 1 Atk. 232;

Paul v. Birch, 2 Atk. 623; *Ryall v. Rolle*, 1 Atk. 172; *Ex parte Chion*, note (A) to *Godfrey v. Furzo*, 3 P. W. 187.

(*h*) 32 & 33 Vict. c. 71, s. 15; [46 & 47 Vict. c. 52, s. 44.]

(*a*) See *Taylor v. Plumer*, 3 M. & S. 575; *Scott v. Surman*, Willes, 404; [*Ex parte Cooke*, 4 Ch. D. 123.]

(*b*) *Tooke v. Hollingworth*, 5 T. R. 227, *per* Lord Kenyon; see *Taylor v. Plumer*, 3 M. & S. 571.

(*c*) *Miller v. Race*, 1 Burr. 457, *per* Lord Mansfield.

under which he was bound to appropriate them in the cash purchase of barley; (2) that even if the barley and malt which remained at the time of the bankruptcy in the bankrupt's possession were not bought in accordance with the authority given to the agent, and the legal property in them was not in the brewers but in the agent, he was a trustee of them for the brewers to the extent of the moneys advanced by the brewers, for they were the product of or substitute for the original trust property, and as such subject to the trust; and (3) that the bankrupt or his representative could not be allowed to set up the bankrupt's fraud and abuse of trust to defeat the title of his *cestui que trust* (d).]

6. **Factor selling and taking notes.**—So, if the factor sell the goods and take *notes* in payment the value of the notes, notwithstanding the bankruptcy, may be recovered by action from the creditor's trustee (e); for, though negotiable securities are said, like money, to have no ear-mark, the *expression does not intend that such securities in [*241] the hands of a bankrupt have run into the general mass of his property, and pass to his creditors, but only that negotiable securities, as a circulating medium in lieu of money, cannot be recovered from a person to whom they have been legally negotiated (a).

7. **Factor selling for money payable at a future day.**—So, if a factor sell the goods of his employer for money payable at a future day, and become bankrupt, and the creditors' trustee receives the money, he will be answerable for it to the merchant by whom the factor was employed (b).

8. **Tortious conversion of the trust property.**—In another case the conversion had been in *breach of the factor's duty* (c); and it was argued that, as the principal would not have been bound to accept the property which the agent had wrongfully purchased, the Court ought not to

[(d) *Harris v. Truman*, 7 Q. B. D. 340; 9 Q. B. D. 264.]

(e) *Anon. case*, cited *Ex parte Dumas*, 2 Ves. 586.

(a) *Hartop v. Hoare*, 3 Atk. 50, per Lee, C. J.; *Miller v. Race*, 1 Burr. 457.

(b) *Ryall v. Rolle*, 1 Atk. 172, per Burnet, J.; *Taylor v. Plumer*, 3 M. & S. 577; *Zinck v. Walker*, 2 W. Bl. 1154; *Garratt v. Cullum*, Bull. N. P. 42.

(c) *Taylor v. Plumer*, 3 M. & S. 562; see *Ryall v. Rolle*, 1 Atk. 172.

give a *lien* to the principal upon the tortious acquisition; but the Court said, it was impossible that an abuse of trust could confer any right on the person abusing it, or those claiming in privity with him (*d*).

[9. **Stockbroker selling.** — So, if a trustee employ a stockbroker to sell out consols and invest the proceeds on behalf of the trust estate, the money arising from the sale is trust money, and may be followed into the hands of the trustee in bankruptcy of the broker (*e*).

Where money was borrowed for the purpose of purchasing a specific property which was to be mortgaged to secure the loan; and the borrower in lieu of applying the money for the specific purpose paid it into a bank and drew upon it, and the borrower subsequently became bankrupt, it was held that the lender could follow and claim so much of the money as remained in the bank unapplied.¹]

10. **In whose name actions must be brought to recover the trust estate from the creditors' trustee.** — Where the legal property does not pass, any action against the creditors' trustee must be brought by the bankrupt himself, for he is the person possessed of the legal right (*f*); but, in the case of a *factor*, an action may also be brought by the principal, for the absolute property remains with the employer, and a special property only vests in the agent (*g*). But, if *bills* be remitted to a factor, and made payable to him or his order, it has been doubted whether the property does not so vest in the factor, that no action of trover can be maintained by the principal (*h*).

11. **Where the trust estate has become amalgamated with the trustee's other property, the cestui que trust must prove for the amount.** — If the property possessed by the bankrupt

(*d*) *Taylor v. Plumer*, 3 M. & S. 574, *per* Lord Ellenborough; [*Harris v. Truman*, 7 Q. B. D. 340; 9 Q. B. D. 264.]

[(*e*) *Ex parte Cooke*, 4 Ch. D. 123.]

(*f*) *Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40.

(*g*) *L'Apostre v. Le Plaistrier*, cited *Copeman v. Gallant*, 1 P. W. 818; *Delauney v. Barker*, 2 Stark. 539; *Boddy v. Esdaile*, 1 Car. 62.

(*h*) *Ex parte Dumas*, 2 Ves. 583.

¹ *Gibert v. Gonard*, 54 L. J. N. S. Ch. 489.

in his character of trustee has become so amalgamated with his general property that it can no longer be identified, the representative of the trust has then no other remedy but to come in as a general creditor and prove for the amount of the loss (*i*). But, in one case, though * the [*242] trust money had *got into* the general fund, it was held, but under very particular circumstances, to have subsequently *got out again* (*a*).

12. **Case of a bankrupt trustee having a beneficial interest.** — As a general rule, where the bankrupt has a substantial beneficial interest, however small, in property legally vested in him, such property passes to the creditors' trustee, who takes as trustee for the creditors and other parties interested (*b*). It is conceived, however, that the rule would not apply to a case where a bankrupt is expressly a trustee, though he may himself have some partial beneficial interest, for his act ought not to work a prejudice to others, and as a conveyance by the bankrupt himself to a stranger would be a breach of trust, it can hardly be supposed that the Bankrupt Act could be construed to have a similar tortious effect (*c*). Where the trust is constructive and the equity doubtful, the Court has sometimes directed the creditors' trustee to concur in conveying (*d*). And where the *legal* property passes, the *cestuis que trust* may have the same relief in equity against the creditors' trustee, as they would have been entitled to against the bankrupt himself (*e*).

(*i*) *Ex parte Dumas*, 1 Atk. 234; per Lord Hardwicke; *Ryall v. Rolle*, 1 Atk. 172, per Burnet, J.; *Scott v. Surman*, Willes, 403, 404, per Willes, C. J.; [*Ex parte Dale and Co.*, 11 Ch. D. 772; and see *Re Hallett's Estate*, 18 Ch. D. 696.]

(*a*) *Ex parte Sayers*, 5 Ves. 169.

(*b*) *Carpenter v. Marnell*, 8 B. & P. 40; *Parnham v. Hurst*, 8 M. & W. 743; *Leslie v. Guthrie*, 1 Bing. N. C. 697; *D'Arnay v. Chesneau*, 13 M. & W. 809. See *Boddington v. Castelli*, 1 Ell. & Bl. 879.

(*c*) See *Faussett v. Carpenter*, cited *ante*, p. 226, as to the effect of a con-

veyance expressed in general words upon a trust estate.

(*d*) *Bennet v. Davis*, 2 P. W. 316; *Taylor v. Wheeler*, 2 Vern. 564; *Ex parte Gennys*, Mont. & Mac. 258.

(*e*) *Bennet v. Davis*, 2 P. W. 316; *Taylor v. Wheeler*, 2 Vern. 564; *Mitford v. Mitford*, 9 Ves. 100, per Sir W. Grant; *Ex parte Dumas*, 2 Ves. 585, per Lord Hardwicke; *Hinton v. Hinton*, 2 Ves. 633, per *eundem*; *Grant v. Mills*, 2 V. & B. 309, per Sir W. Grant; *Jones v. Mossop*, 3 Hare, 572, per Sir J. Wigram; *Tyrrell v. Hope*, 2 Atk. 558; *Bowles v. Rogers*, 6 Ves. 95, note (*a*); *Ex parte Hansom*,

[13. *Of trust chattels left in the possession of the bankrupt trustee.* — By the Bankruptcy Act, 1883, it is enacted that the property of the bankrupt divisible amongst his creditors shall comprise “all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt *in his trade or business*, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.” Thus, although all persons (traders or not) can now be made bankrupts, only those engaged in some trade or business come under the operation of the order and disposition clause; and, as it would [*243] * seem, then only as to goods affected by such trade or business. The same section also provides that “*things in action* other than debts due or growing due to the bankrupt in the course of his *trade or business* shall not be deemed *goods* within the meaning of the section” (a).

It should be observed that this section differs from the corresponding section in the Bankruptcy Act, 1869 (b), which applied to the goods in the order and disposition of the bankrupt trader, whether in his trade or business or not. But the existence of this distinction has been denied by V. C. Bacon, in the case under the Act (c). Under these sections it has been held that shares in companies are not things in action within the Acts (d); but that debentures of a company, by which they undertake to pay a sum of money and interest, and charge their undertaking and property with the payment thereof (e), and policies of life assurance (f), and equitable interests in shares which are registered in the names of other persons (g), are such things in action.]

12 Ves. 349, per Lord Eldon; *Ex parte* Coysegame, 1 Atk. 192; Frith v. Cartland, 2 H. & M. 417; Fleeming v. Howden, 1 L. R. H. L. Sc. 372; [Harris v. Truman, 7 Q. B. D. 340; 9 Q. B. D. 264;] see Mestaer v. Gillespie, 11 Ves. 624; *Ex parte* Herbert, 13 Ves. 188; Waring v. Coventry, 2 M. & K. 406.

[(a) 46 & 47 Vict. c. 52, s. 44.]

[(b) 32 & 33 Vict. c. 71, s. 15.]

[(c) Colonial Bank v. Whinney, 32 W. R. 974.]

[(d) Union Bank of Manchester, *Re* Jackson, 12 L. R. Eq. 364; Colonial Bank v. Whinney, 32 W. R. 974, a case under the last Act on appeal, 30 Ch. Div. 261; and see Société Générale de Paris v. Tramways Union Company, 14 Q. B. D. 424.]

[(e) *Re* Pryce, 4 Ch. D. 685.]

[(f) *Ex parte* Ibbetson, 8 Ch. D.

519.]

[(g) *Ex parte* Barry, 17 L. R. Eq.

113.]

No forfeiture where they are in his possession according to the title.—It has been decided under the corresponding clause in the previous Bankruptcy Acts, that the enactment does not apply where the possession of the goods by the bankrupt can be satisfactorily accounted for by the circumstances of the title, as, if a trustee be in possession of effects upon trust for payment of debts, and become bankrupt (*h*), or if goods be vested in A. upon trust to permit B. to have the enjoyment during his life, and B. becomes bankrupt while in possession under his equitable title (*i*); or if A. for valuable consideration assign his goods to a trustee for A.'s wife for her separate use, and the goods are in the house occupied by A. and his wife at the date of his bankruptcy (*j*). So property which belongs to a married woman for her separate use, but as to which the husband, by reason of there being no other trustee, is a trustee for the wife, is not affected by the enactment.¹ But if a residue be given to trustees upon trust to *sell* with all convenient speed, and to invest the proceeds in the purchase of an annuity for the lives of A. (one of the trustees) and her children, the amount to be paid to A. for the benefit of the children, and if instead of selling the trustees *permit A. to retain [*244] possession for a length of time, the goods are forfeited, such possession being contrary to the title (*a*).

14. Executors and administrators.—The enactment does not extend to a lawful and necessary possession *en autor droit*, as that by executors and administrators (*b*); but there will be no exemption from the forfeiture if the executor can be proved to have dismissed the character of per-

(*h*) *Copeman v. Gallant*, 1 P. W. 314; and see under the Bankruptcy Act, 1869, *Ex parte Barry*, 17 L. R. Eq. 113.

(*i*) *Ex parte Martin*, 19 Ves. 491; S. C. 2 Rose, 331; see *Ex parte Harwood*, 1 Mont. & Mac. 169; Mont. 24; *Jarman v. Woolloton*, 3 T. R. 618; *Ex parte Massey*, 2 Mont. and Ayr. 173; *Ex parte Elliston*, 2 Mont. and

Ayr. 365; *Ex parte Geaves*, 8 De G. M. & G. 291; 2 Jur. N. S. 651; *Re Bankhead's Trust*, 2 K. & J. 560.

(*j*) *Ex parte Cox*, 1 Ch. D. 302.

(*a*) *Ex parte Moore*, 2 Mont. D. and De G. 616; and see *Fox v. Fisher*, 3 B. & Ald. 135; *Ex parte Thomas*, 3 Mont. D. & De G. 40.

(*b*) *Ex parte Marsh*, 1 Atk. 168; *Joy v. Campbell*, 1 Sch. & Lef. 328.

¹ *Ex parte Sibeth*, 14 Q. B. D. 417.

sonal representative, and to have assumed that of absolute owner (c).

15. **Factors.** — So goods in the possession of *factors*, in the ordinary course of their trade, are not forfeitable under this clause (d).

16. **Reversions.** — The forfeiture clause affects interests in reversion as well as in possession (e), though such interests are contingent (f), and the circumstance that notice was given to the trustee, after the bankruptcy, but before the appointment of assignees in bankruptcy, has been held not to prevent the operation of the Act (g).

17. **Deposits.** — Under the old Bankruptcy Acts, no forfeiture was incurred where the security for a *chose in action*, as a policy, was deposited with a banker, not by way of equitable assignment so as to give the banker a right to receive the money, but by way of *lien*, so as to disable the bankrupt from receiving the money (h). But the case was otherwise where the deposit was had a right conferred upon him to receive the money, for then the *chose in action* was forfeited (i).

18. **Ignorance.** — The clause has been held not to apply where the true owner was ignorant of his being such, for if he did not know that he was the true owner, how could he have given any consent as such (j). And where the bankrupt held in trust for a corporation which had no power to possess such property, it was ruled that the corporation, being a mere abstraction of law, and incapable of action

(c) *Fox v. Fisher*, 3 B. & Ald. 135; *Ex parte Moore*, 2 Mont. D. & De G. 616; *Ex parte Thomas*, 3 Mont. D. & De G. 40; see *Quick v. Staines*, 1 B. & P. 293; *Whale v. Booth*, cited *Farr v. Newman*, 4 T. R. 625, note (a).

(d) *Mace v. Caddell*, Cowp. 232; *Ex parte Pease*, 19 Ves. 46, per Lord Eldon; *L'Apostre v. Le Plaistrier*, cited *Copeman v. Gallant*, 1 P. W. 318; *Whitfield v. Brand*, 16 M. & W. 282.

(e) *Bartlett v. Bartlett*, 1 De G. & J. 127; *Re Rawbone's Trust*, 3 K. &

J. 300, 376; *Rickards v. Gledstones*, 3 Giff. 298.

(f) *Hensley v. Wills*, 16 L. T. N. S. 582; *Davidson v. Chalmers*, 33 Beav. 653.

(g) *Re Tichener*, 35 Beav. 317.

(h) *Gibson v. Overbury*, 7 M. & W. 555.

(i) *Green v. Ingham*, 2 L. R. C. P. 525.

(j) *Re Rawbone's Trust*, 3 K. & J. 300, 476; and see *Ex parte Ford*, 1 Ch. D. 521; *In re Hickey*, 10 Ir. Rep. Eq. 117.

beyond the limits of its own legal powers, could not consent as *true owner* (*k*).

19. **Whether bare trustee a "true owner."** — Whether the permission of a *bare trustee* can be said to be *that of the "*true owner*," to the prejudice of his [*245] innocent *cestuis que trust* is a question of some difficulty (*a*). It has been decided that a *cestui que trust* absolutely entitled is a *true owner* within the meaning of the Act (*b*). But here the trustee is a mere passive depositary, and can do *no* act without the direction of his *cestui que trust* (*c*); but the case is different, where, as in a marriage settlement, a fund is vested in trustees in trust for persons under disability or not in existence, and it is therefore intended that they should act on behalf of all parties as the absolute proprietors. It would seem that here the trustees are regarded as the true owners, and that if the funds are left by the trustees in the order and disposition of the bankrupt, they are so left with the consent of the true owners (*d*).

20. **Of judgments against the trustee.** — *Judgments*, at least so far as they affect *lands* (for execution against goods and chattels is by common law), derive their origin from certain statutory enactments (*e*).

Had trusts been established at the time when these statutes were passed, the construction would probably have been the same as in the case of the Bankruptcy Acts, that is, judgments would have been held to bind those lands only of which the conusee was seised beneficially; but trusts at the period of which we are speaking had not made their appear-

(*k*) *Great Eastern Railway Company v. Turner*, 8 L. R. Ch. App. 149.

(*a*) See *Ex parte Richardson*, Buck, 480; *Ex parte Horwood*, 1 Mont. & Mac. 169, Mont. 24; *Viner v. Cadell*, 3 Esp. 88; *Ex parte Geaves*, 8 De G. M. and G. 291.

(*b*) *Ex parte Burbridge*, 1 Deac. 131; 4 Deac. & Ch. 87; and see *Day v. Day*, 1 De G. & J. 144.

(*c*) See *Ex parte Culley*, 9 Ch. D. 307; *Ex parte Dearle*, 14 Q. B. D. 184, which show that a mere trustee

of a debt for an absolute beneficial owner not under disability cannot alone sustain a petition for adjudication of bankruptcy against the debtor.]

(*d*) *Ex parte Caldwell*, 13 L. R. Eq. 188; *Darby v. Smith*, 8 T. R. 82; *Ex parte Dale*, Buck, 365; and see *Hensley v. Wills*, 16 L. T. N. S. 582.

(*e*) 11 E. 1; 13 E. 1, st. 1, c. 18; 13 E. 1, st. 3; 27 E. 3, st. 2, c. 9; see *Co. Lit.* 289, b.

ance, and therefore judgments have been held to bind all lands of the conusee, whether vested in him beneficially, or in the character of trustee. But of course the *cestui que trust* will be protected from the legal process by application to a Court of equity (*f*).

[21. **Garnishee order.**—A garnishee order *nisi* to attach a debt due to a trustee will not be made absolute, if a *prima facie* case be made out that the money sought to be attached is trust money, but the money will be ordered into Court to abide the event of an inquiry whether it be trust money or not (*g*).]

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* SECTION III.

WHAT PERSONS TAKING THE LEGAL ESTATE WILL BE BOUND BY THE TRUST.

1. **General rule.**—The universal rule, as trusts are now regulated, is, that all persons who take *through or under the trustee* (except purchasers for valuable consideration without notice), shall be liable to the trust.¹

2. **Heir and executor bound by the trust.**—On the death of the trustee, the *heir* (*a*), *executor*, or *administrator*, becomes the *legal* owner of the property; but as he merely represents the ancestor, testator, or intestate, he takes in the same character, and is therefore bound by the same equity.

3. **So the devisee.**—So, if a trustee devise the estate, the *devisee* takes the estate subject to the trust (*b*).

4. **And assigns by act inter vivos.**—So all *assigns* of the trusts by acts *inter vivos* (except purchasers for valuable consideration without notice), will be bound by the trust (*c*).

(*f*) *Finch v. Earl of Winchelsea*, 1 P. W. 277; *Burgh v. Francis*, 1 Eq. Ca. Ab. 320; *Medley v. Martin*, *Finch*, 63; *Prior v. Penpraze*, 4 Price, 99; *Langton v. Horton*, 1 Hare, 560, *per* Sir J. Wigram. See *ante*, p. 224, as to chattels taken in execution.

[(*g*) *Roberts v. Death*, 8 Q. B. D. 319.]

[(*a*) See now 44 & 45 Vict. c. 41, s. 30.]

(*b*) *Marlow v. Smith*, 2 P. W. 201, *per* Sir J. Jekyll; *Lord Grenville v. Blyth*, 16 Ves. 231, *per* Sir W. Grant.

(*c*) See *infra*.

¹ And, taking subject to the trust, they must either execute it, or convey the trust property to new trustees appointed by the Court.

5. *So assigns in the post.* — Assigns in the *post*, or by operation of law, are also invested with the character of trustees; as if a trustee marry, the wife is at *law* entitled to her dower, and if a female trustee marry, the husband is at *law* entitled to his curtesy, but in *equity* both the *dowress* (*d*) and *tenant by the curtesy* (*e*), are compellable to recognise the right of the *cestui que trust*. So a *creditor* of the trustee extending the trust estate under an *elegit* (*f*), or taking a trust chattel *by writ of execution (*a*), and by the same [*247] rule the creditors' trustee under a bankruptcy (*b*) are made subject to the equity.

6. *Forfeiture.* — And if the trustee commit a *forfeiture*, the lord, as he succeeds to the identical estate of the forfeitor, must take the property with all the engagements and incumbrances attached to it, and is therefore liable to the trust (*c*).

(*d*) *Pawlett v. Attorney-General*, Hard. 469, *per* Lord Hale; *Noel v. Jevon*, Freem. 43; *Hinton v. Hinton*, 2 Ves. 634, *per* Lord Hardwicke.

(*e*) *Bennet v. Davis*, 2 P. W. 319.

(*f*) *Pawlett v. Attorney-General*, Hard. 466, *per* Lord Hale; *Kennedy v. Daly*, 1 Sch. & Lef. 373, *per* Lord Redesdale; *Finch v. Earl of Winchelsea*, 1 P. W. 277; *Burgh v. Burgh*, Rep. t. Finch, 28. In the case of *Whitworth v. Gaugain*, 1 Cr. & Ph. 325, where a person made a deposit of title deeds, and then a judgment was entered up against him, Lord Cottenham expressed a doubt whether the judgment creditor, *if he had no notice*, would be bound by the prior equity. However, such a doctrine was not tenable, for a judgment creditor is not a purchaser for valuable consideration. *Brace v. Duchess of Marlborough*, 2 P. W. 491. He advances money, but not on the security of this estate. He may take the person of his debtor, or his goods and chattels, and if he is put in possession of the lands, it is not as purchaser of them, but by course of law. The cause was afterwards heard, and Lord Cottenham's doubts were displaced by a decision the other way, 3 Hare,

416; 1 Ph. 728. In *Watts v. Porter*, 3 Ell. & Bl. 743, three of the four judges, while approving of *Whitworth v. Gaugain*, refused to apply the principle of it to a case of stock. The remaining judge differed, and held that in personal, as in real estate, the specific incumbrancer, though he gives no notice to the trustee, prevails over the judgment creditor, though he has obtained a charging order. It is conceived that the single judge took the clearer view. Those who determined the other way, seem to have assumed that notice was necessary for the transfer of an equitable interest, which is not true as between assignor and assignee, but only as between two contending assignees. The case of *Watts v. Porter* has since been disapproved by the highest authorities, *Beavan v. Lord Oxford*, 6 De G. M. & G. 507; *Kinderley v. Jervis*, 22 Beav. 34; *Scott v. Hastings*, 4 K. & J. 683.

(*a*) *Foley v. Burnell*, 1 B. C. C. 278, *per* Lord Thurlow.

(*b*) See *suprà*, p. 242, note (*e*).

(*c*) *Burgess v. Wheate*, 1 Eden, 230, *per* Sir T. Clarke; *Ib.* 252, *per* Lord Henley.

In the case of a forfeiture to the Crown, it was formerly held that there was no equity against the Crown (*d*); but in modern times the equity was admitted, though the precise nature of the remedy was never distinctly ascertained (*e*).

7. **Escheat.** — A lord taking by *escheat* stands on a somewhat different footing, for he does not take through or under the trustee at all; he is not an *assign* of the trustee either in the *per* or *post*; nor does he, as in forfeiture, succeed to the place of the trustee, but claims by a title paramount of his own, by virtue of a condition originally annexed to the land, and wholly independent of the creation of the trust.

Burgess v. Wheate. — Lord Mansfield was of opinion, however, in *Burgess v. Wheate* (*f*), that a trust ought to be binding on the lord, and cited the opinions said to have been expressed by Lord Chief Justice Bridgman and Sir John Trevor (*g*); but as to the words attributed to the former, it appears from his own note-book, that they were never spoken (*h*); and the observation of Sir John Trevor was at the utmost a mere *obiter dictum*. Sir Thomas Clarke, on the other hand, who assisted Lord Mansfield in the case of *Burgess v. Wheate*, thought that *cestui que trust* was no more relievable against the lord by escheat, than against a sale by the trustee to a purchaser without notice (*i*); and Lord Northington's inclination was apparently the same way, though, as the point was not necessarily involved in the question before him, he declined to conclude himself [*248] by any *express and direct opinion (*a*). It is clear that the lord was not bound by a *use*. However, it must be admitted that in modern times the Courts have acted on more liberal principles; and it has been actually decided that where the fee out of which a mortgage term has been

(*d*) *Wike's case*, Lane, 54, agreed.

(*e*) *Burgess v. Wheate*, 1 Eden, 252; and see *Pawlett v. Attorney-General*, Hard. 467, which was a case of forfeiture, though treated by Lord Hale as a case of escheat. And see *suprà*, p. 30.

(*f*) 1 Eden, 177, see p. 229; and

see observations upon Lord Mansfield's argument in 3d edit. p. 281.

(*g*) *Burgess v. Wheate*, 1 Eden, 230.

(*h*) See *Ib.* 230, note (*a*); and see Sir T. Clarke's observations, *Ib.* 202.

(*i*) *Ib.* 1 Eden, 203.

(*a*) *Ib.* 1 Eden, 246.

carved escheats to the lord, he may redeem (*b*), and if the lord may take a benefit through the tenant, it seems to follow that he must sustain an onus. Indeed, an opinion to that effect has been enunciated by Lord Justice James when Vice-Chancellor (*c*), and also by an equity court in Ireland (*d*). Now that the Acts, 13 & 14 Vict. c. 60, [and 44 & 45 Vict. c. 41,] (to be noticed presently), have been passed, it is unlikely that the point will ever call for a decision.

8. *Copyholds*.—In *copyholds* there is, properly speaking, no such thing as escheat. The freehold and inheritance are vested in the lord of the manor, and the tenant has no claim but according to the entry on the court roll. If the tenant be a trustee, and no trust appears on the roll, there can be no pretence for charging the lord with an equity to which he never assented (*e*); but if a surrender be made upon a trust either *expressed* or *referred to* on the roll, the lord is stopped by this evidence of his will, and cannot afterwards claim in contradiction to his grant (*f*).

9. *Customary freeholds*.—*Customary freeholds* held not at the will of the lord, but according to the custom of the manor, stand on the same footing as copyholds in reference to escheat (*g*), for it is now established that customary freeholds are in fact copyholds, but of a privileged character (*h*).

10. *Equity of redemption*.—A distinction was taken by Lord Hale between a *trust* and an *equity of redemption*. “A trust,” said his Lordship, “is created by the contract of the party, and he may direct it as he pleaseth, and he may provide for the execution of it, and therefore one that comes in in the *post* shall not be liable to it without express mention

(*b*) Viscount Downe v. Morris, 3 Hare, 394.

(*c*) *Re Martinez' Trust*, 22 L. T. N. S. 403.

(*d*) White v. Baylor, 10 I. R. Eq. Rep. 54; and see Evans v. Brown, 5 Beav. 116.

(*e*) Attorney-General v. Duke of Leeds, 2 M. & K. 343; and see Peachy v. Duke of Somerset, 1 Str. 454; Burgess v. Wheate, 1 Eden, 231.

(*f*) Burgess v. Wheate, 1 Eden, 231, per Lord Mansfield; Weaver v. Maule, 2 R. & M. 97; and see Everingham v. Ivatt, 7 L. R. Q. B. 683; affirmed 8 L. R. Q. B. 388; [Gallard v. Hawkins, 27 Ch. D. 298.]

(*g*) Weaver v. Maule, 2 R. & M. 100, per Sir John Leach.

(*h*) Duke of Portland v. Hill, 12 Jur. N. S. 286.

made by the party; and the rules for executing a trust have often varied, and therefore they only are bound by it who come in in privity of estate; but a power of redemption [*249] tion is an * equitable right inherent in the land, and binds all persons in the *post* or otherwise (*a*), because it is an ancient right which the party is entitled to in equity" (*b*). But upon this distinction it must be observed, that even a trust will at the present day bind persons who take derivatively from the trustee, though in the *post*; and notwithstanding an equity of redemption amounts to what Lord Hale calls a *title* (*c*), there seems to be no reason why in the case of escheat the lord, who takes by title paramount, should be bound by an equity of redemption any more than by a simple trust (*d*).

Viscount Downe v. Morris.—In a late case (*e*), however, the distinction between an equity of redemption and a trust was observed upon, and the Court expressed an opinion that a lord who was in by escheat would be bound by an equity of redemption, if not by a trust (*f*).

11. **Real estate escheating is assets in the hands of the lord.**—The 3 & 4 W. 4, c. 104 (which subjects a person's real estate to the payment of his simple contract debts), annexes the quality of assets to the estate itself, and, subject to the right of alienation by the heir or devisee (*g*), creates a charge on the estate for the benefit of the creditors (*h*); and it has

(*a*) *Semle* not a purchaser without notice; see *Harding v. Hardrett*, Rep. t. Finch, 9; *Spurgeon v. Collier*, 1 Eden, 55.

(*b*) *Pawlett v. Attorney-General*, Hard, 469; and see *Bacon v. Bacon*, Tothill, 133; *Burgess v. Wheate*, 1 Eden, 206; *Tucker v. Thurston*, 17 Ves. 133.

(*c*) See *Pawlett v. Attorney-General*, Hard, 467.

(*d*) See *Burgess v. Wheate*, 1 Eden, 255; *Attorney-General v. Duke of Leeds*, 2 M. & K. 344. *Pawlett v. Attorney-General*, Hard, 465, in which Lord Hale and Baron Atkins thought the king was bound by an equity of redemption, was not a case

of *escheat*, as called by Lord Hale, but of *forfeiture*.

(*e*) *Viscount Downe v. Morris*, 3 Hare, 394.

(*f*) *Ib.*

(*g*) *Spackman v. Timbrell*, 8 Sim. 253; *Richardson v. Horton*, 7 Beav. 112; *Hynes v. Redington*, 10 Ir. Ch. Rep. 194; *Pimm v. Insall*, 7 Hare, 193; 1 Mac. & G. 449; and see *Dilkes v. Broadmead*, 2 Giff. 113.

(*h*) *Evans v. Brown*, 5 Beav. 116 N. B. This case was appealed and compromised. *Hamer's Devises*, 2 De G. M. & G. 386; *Beale v. Symonds*, 16 Beav. 406; *Kinderley v. Jervis*, 22 Beav. 1.

been held that a debtor's estate is assets, even in the hands of the lord taking by escheat (*i*).

12. 13 & 14 Vict. c. 60.—The law relating to the forfeiture and escheat of trust estates, except so far as it illustrates general principles, has now, by the interference of the Legislature, become of little importance; for by 13 & 14 Vict. c. 60, it is enacted in effect, by sect. 15, that in case of *failure of heirs of a trustee*, the Court of Chancery shall have power, upon summary application, to transfer the legal estate (*j*); * and by sect. 46, the trust property [*250] shall not escheat or be forfeited by reason of the *attainder* or *conviction for any offence of the trustee*; [and by 44 & 45 Vict. c. 41, s. 30, in the case of the death of a trustee after the 31st December, 1881, the legal estate in realty devolves upon the legal personal representative of the trustee, and may be disposed of and dealt with by him as if it were a chattel real.]

13. *Outlawry of the trustee*.—If a trustee be *outlawed* for *treason* or *felony*, the outlawry amounts to conviction (*a*), and the ordinary consequences of forfeiture or escheat (*b*) are averted by the above act. But an outlawry on an indictment for a *misdemeanour* or in a *personal action* (*c*) is not equivalent to a conviction of the offence, but merely of a contempt of Court (*d*), punishable with forfeiture of the life rent of the outlaw's lands, and of his chattels, real and personal, absolutely, and in this case, therefore, the statute does not apply.

14. *A disseisor not bound by the trust*.—A *disseisor* is not an assign of the trustee either in the *per* or *post*, for he does not claim through or under the trustee, but holds by a wrongful title of his own, and adversely to the trust.¹ The first

(*i*) *Evans v. Brown*, 5 Beav. 116; case, 8 Mod. 42; *King v. Ayloff*, *Ib.* and see *Viscount Downe v. Morris*, 3 Hare, 394. 72.

(*b*) See pp. 27, 28, *suprà*.

(*j*) See *Re Martinez' Trust*, 22 L. T. N. S. 403; and *post*, Appendix, No. 2.

[(*c*) Outlawry in civil actions is now abolished. See 42 & 43 Vict. c. 59.]

(*a*) Co. Lit. 390 b.; *Holloway's*

(*d*) *Rex v. Tippin*, Salk. 494.

¹ A *cestui que trust* cannot compel a disseisor to hold subject to the same trust, as the trustee; his only remedy is against the trustee, who may, if necessary, be removed.

resolution in Sir Moyle Finch's case was, that "a disseisor was subject to no trust, nor any *subpœna* was maintainable against him, not only because he was not in the *post*, but because the right of inheritance or freehold was determinable at the common law, and not in Chancery, neither had the *cestui que trust* (while he had his being) any remedy in that case" (e). And we may add the authority of Lord St. Leonards, who, in his edition of Gilbert on Uses, observes, "At this day every one is bound by a trust who obtains the estate without a valuable consideration, or even for a valuable consideration if with notice, unless perhaps the lord by escheat. But persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if I oust A., who is a trustee for B., and a claim is not made in due time, A. will be barred, and his *cestui que trust* with him, although I had no notice of the trust" (f) (1). And the same thing may be inferred from the terms of the section of the late Limitation Act relating to express trusts (g).

(e) Sir Moyle Finch's case, 4 Inst. 85.

(f) Gilbert on Uses, Sugd. ed. 249.
(g) 3 & 4 W. 4. c. 27, s. 25.

(1) And an outstanding term in a trustee would have attended the inheritance gained by the disseisin. *Reynolds v. Jones*, 2 Sim. & St. 206; and see *Turner v. Buck*, 22 Vin. Ab. 21; *Doe v. Price*, 16 M. & W. 603.

GENERAL PROPERTIES OF THE OFFICE OF TRUSTEE.

FROM the *estate* of the trustee we pass on to the consideration his *office*, and upon this subject we shall, in the first place, investigate the *general* properties of the office, as, *First*. A trustee having once accepted the trust cannot afterwards renounce it. *Secondly*. He cannot delegate it. *Thirdly*. In the case of co-trustees the office must be exercised by all the trustees jointly. *Fourthly*. On the death of one trustee there is survivorship, that is, the trust will pass to the survivors or survivor. *Fifthly*. One trustee shall not be liable for the acts of his co-trustee. *Sixthly*. A trustee shall derive no personal benefit from the trusteeship.

First. A trustee who has accepted the trust cannot afterwards renounce.¹

1. **Trustee cannot renounce after acceptance.**—It is a rule, without any exception, that a person who has once undertaken the office, either by actual or constructive acceptance, cannot discharge himself from liability by a subsequent *renunciation*. The only mode by which he can obtain a

¹ Having accepted the trust, the trustee cannot afterwards renounce it or free himself from the responsibility of its management; *Shepherd v. M'Evers*, 4 Johns. Ch. 136; 8 Am. Dec. 561; *Armstrong v. Morrill*, 14 Wall. 138; *Cruger v. Halliday*, 11 Paige, 314; *Perkins v. McGavock*, 3 Hay. 265; *Drane v. Gunter*, 19 Ala. 731; *Jones v. Stockett*, 2 Bland. 409; except in accordance with the terms of the trust, by consent of the parties in interest, or by a decree of court; *Ibid.*, *Re Bernstein*, 3 Redf. 20; *Diefendorf v. Spraker*, 10 N. Y. 246. In the United States there are statute regulations in reference to trustees, the care of the estate and the appointment of new trustees. It is questionable whether the heir of one named as trustee and who has never signified what action he would take, can renounce the trust. The surviving trustee may disclaim, if his co-trustee never accepted the trust. A trustee would not have to convey until he had been reimbursed for all sums paid out; *Saunders v. Webber*, 39 Cal. 287; *Barker v. Barker*, 14 Wis. 131; neither can an executor renounce. See note on disclaimer.

release is either under the sanction of a Court of Equity, or by virtue of a special power in the instrument creating the trust, [or of a statutory power (a)], or with the consent of all the parties interested in the estate and being *sui juris* (b).

Executor cannot renounce after he has acted. — Thus, where A. was named executor, and acted in behalf of some particular legatees, but disclaimed the intention of interfering generally, and then renounced, and B. obtained letters of administration *cum testamento annexo*, and possessed himself of assets, and died insolvent, it was held that A., having acted, could not afterwards discharge himself, and was responsible for the *devastavit* committed by B. (c).

[*252] *2. **Moorcroft v. Dowding.** — Though a trustee may have given a bond for the due execution of the trust, and the *cestui que trust* may have recovered upon the bond, and been paid the money, yet, if the *cestui que trust* afterwards take proceedings to compel a conveyance of the trust estate, the trustee cannot divest himself of his fiduciary character by pleading that the penalty of the bond was a stated damage for the breach of trust, and that on payment of the penalty the trustee should be released. A conveyance, however, will not be decreed without an allowance to the trustee of the penalty recovered upon the bond, with the interest at the usual rate (a).

Secondly. The office of trustee, being one of personal confidence, cannot be *delegated*.¹

[(a) See 44 & 45 Vict. c. 41, ss. 31, 32.] 80. As to the discharge of the trustee, see Ch. XXV. *infra*.

(b) See *Doyle v. Blake*, 2 Sch. & Lef. 245; *Chalmer v. Bradley*, 1 J. & W. 68; *Read v. Truelove*, Amb. 417; *Manson v. Baillie*, 2 Macq. H. L. Cas. 314. (c) *Doyle v. Blake*, 2 Sch. & Lef. 231; see *Lowry v. Fulton*, 9 Sim. 123. (a) *Moorcroft v. Dowding*, 2 P. W. 314.

¹ *Delegation of the trust.* — The powers and duties of a trustee cannot be delegated unless there are express directions to that effect in the trust; *Winthrop v. Attorney-General*, 128 Mass. 258; *Wilson v. Towle*, 36 N. H. 129; *Suarez v. Pumpelly*, 2 Sandf. Ch. 336. The settlor may make any provisions in reference to the trustees and their powers that he wishes; *Whelan v. Reilly*, 3 W. Va. 597; he may direct his trustee to name his successor; *Abbott, Petr.* 55 Me. 580; but his rights may be limited as against creditors; *Planck v. Schermerhorn*, 3 Barb. Ch. 644; should a trustee attempt to transfer his powers, he will be responsible to his *cestui que trust*; *Taylor v. Hop-*

1. **Trustee cannot delegate the office.** — “Trustees,” said Lord Langdale, “who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons; and if they do so they remain subject to responsibility towards their *cestuis que trust* for whom they have undertaken the duty” (*b*). If a trustee, therefore, confide the application of the trust fund to the care of another, whether a stranger (*c*), or his own attorney or solicitor (*d*), or even co-trustee or co-executor (*e*), he will

(*b*) *Turner v. Corney*, 5 Beav. 517.

(*c*) *Adams v. Clifton*, 1 Russ. 297;

Hardwick v. Mynd, 1 Anst. 109; *Venables v. Foyle*, 1 Ch. Ca. 2; case cited by Sir J. Jekyll, *Walker v. Symonds*, 3 Sw. 79, note (*a*); *Char. Corp. v. Sutton*, 2 Atk. 405; *Kilbee v. Sneyd*, 2 Moll. 199, per Sir A. Hart; *Douglass v. Browne*, Mont. 93; *Ex parte Booth*, id. 248; *Turner v. Corney*, 5 Beav. 515.

(*d*) *Chambers v. Minchin*, 7 Ves. 196, per Lord Eldon; *Ex parte Townsend*, 1 Moll. 139; *Griffiths v. Porter*, 25 Beav. 236; *Ghost v. Waller*, 9 Beav. 497; *Bostock v. Floyer*, 1 L. R. Eq. 26; *S. C.* 35 Beav. 603; *Wood v. Weightman*, 13 L. R. Eq. 434; *Ingle v. Partridge*, 32 Beav. 661, 34 Beav. 411; [*Baylis v. Dick*, W. N. 1878, p. 81;] *Dewar v. Brooke*, 52 L. T. N. S.

489; but see *In re Bird*, 16 L. R. Eq. 203.

(*e*) *Langford v. Gascoyne*, 11 Ves. 333; *Harrison v. Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, note (*y*), 6th ed.; *Davis v. Spurling*, 1 R. & M. 66, per Sir J. Leach; *Kilbee v. Sneyd*, 2 Moll. 200, 212, per Sir A. Hart; *Lane v. Wroth*, and *Stanley v. Darlington*, cited in Anonymous case, Mos. 36; *Marriott v. Kinnersley*, Taml. 470; *Ex parte Winnall*, 3 D. & Ch. 22; *Anon.* Mos. 35; *Clough v. Bond*, 3 M. & Cr. 497, per Lord Cottenham; *Dines v. Scott*, T. & R. 361, per Lord Eldon; *Trutch v. Lamprell*, 20 Beav. 116; *Thompson v. Finch*, 22 Beav. 316; 6 De G. M. & G. 560; *Cowel v. Gatecombe*, 27 Beav. 568; *Eaves v. Hickson*, 30 Beav. 136; [*Rodbard v. Cooke*, 25 W. R. 555.]

kins, 40 Ill. 442; as in case of a transfer to a stranger; *Bales v. Perry*, 51 Mo. 449; *Niles v. Stevens*, 4 Denio, 399; *Berger v. Duff*, 4 Johns. Ch. 368; but this is not so until the trust has been accepted by the trustee, nor if in so doing the settlor's expressed directions are followed. A trustee may employ an agent where he would naturally do so in the regular course of business if no trust existed; *Hawley v. James*, 5 Paige, 487; *Lewis v. Reed*, 11 Ind. 239; *Blight v. Schenck*, 10 Barr. 285; *Thomas v. Scruggs*, 10 Yerg. 401; *State v. Guilford*, 15 Ohio, 593; *Barings v. Willing*, 4 Wash. C. C. 251. One trustee may act for all; *Leggett v. Hunter*, 19 N. Y. 445; *Bowes v. Seeger*, 8 Watts & S. 222; *Abbott v. Rubber Co.* 33 Barb. 579; the accounts will be equitably adjusted, and this is true as regards amount of liability in case of delegation of authority; *Poole v. Munday*, 103 Mass. 174; *Upson v. Badeau*, 3 Bradf. 13. The same is true of a discretionary trust, and the discretion extends only to the original trustee; *Pearson v. Jamison*, 1 McLean, 197; *Doe v. Robinson*, 24 Miss. 688; *Singleton v. Scott*, 11 Ia. 589. It is not necessarily a delegation of power to appoint or give instructions to agents or attorneys; *Bales v. Perry*, 51 Mo. 449; *Mason v. Wait*, 4 Scam. 132. A sale or devise of a discretionary trust is not a delegation; *Saunders v. Webber*, 39 Cal. 287.

be personally responsible for any loss that may result [*258] (f). But trustees were held not * to be responsible where they drew a cheque and delivered it to a co-trustee, but crossed with the names of bankers to whom the money was meant to be paid, and to whom it was payable in the due execution of the trust, and the co-trustee (as the Court assumed) erased the crossing and received the money himself; for such receipt was a fraud on the trustees, and not the result of any act of theirs (a).

2. *Balchen v. Scott*. — The case of *Balchen v. Scott* (b), is no exception to the general rule; for there an executor had received a bill of exchange by the post from a debtor to the estate, and transmitted it to his co-executor, and it was held, that by this proceeding the executor had *not acted* in the trust (c), and therefore was no more answerable for the application of the money by the co-executor, than any stranger would have been under similar circumstances.

3. *Churchill v. Hobson*. — In *Churchill v. Hobson* (d), an executor had paid 500*l.* into the hands of his co-executor, who misapplied it, and it was ruled by the Court that he was not bound to make it good; but the decision is universally considered as having turned upon the circumstance that the co-executor was a *banker*, and had been trusted by the testator in his lifetime, besides being made his executor at his death (e). Lord Harcourt, in his judgment, observed, "The

[(f) But in the ordinary course of business trustees may employ brokers and solicitors as their agents without being liable for their acts. "A trustee," said L. J. Lindley, "has no business to cast upon brokers, or solicitors, or anybody else, the duty of performing those trusts and exercising that judgment and discretion which he is bound to perform and exercise himself. On the other hand a trustee is not bound to do everything himself. A trustee is entitled to employ brokers and solicitors to do that which in the ordinary course of business other people would employ brokers and solicitors to do;" and in the same case, L. J. Bowen

said, "The proposition as to trustees and agents that they cannot delegate means this simply — that a man employed to do a thing himself has not the right to get somebody else to do it, but when he is employed to get it done through others he may do so." *Re Speight*, 22 Ch. D. 727, 756, 763; 9 App. Cas. 1.]

(a) *Barnard v. Bagshaw*, 3 De G. J. & S. 355.

(b) 2 Ves. jun. 678.

(c) As the executor had proved the will he would be deemed at the present day to have accepted the trust. See *ante*, p. 201.

(d) 1 P. W. 241.

(e) See *Harrison v. Graham*, 8

co-executor having been the cashier with whom the testator in his lifetime chose to intrust his money, the executor ought not to suffer for having trusted him whom the testator himself in his life trusted."

4. **Trustee may delegate by testator's direction.**—But trustees cannot be answerable, if they merely follow the testator's directions. Thus a testator by his will recommended his executors to employ A. (who had been in the testator's own employment) as their clerk or agent. The executors gave A. a power of attorney to receive debts, and A. subsequently became insolvent. It was contended that the executors were answerable for the default of A., but Sir A. Hart said that if a testator pointed out an agent to be employed by the executor, and such employee *re- [*254] ceived a sum of money, and immediately made default, the executor would clear himself by showing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money (a).

5. **Trustee acting as agent.**—And an executor cannot be answerable for having handed over money which he had no legal right to retain. Thus, a testator appointed A., B. and C. his executors, and empowered one of them, A., to sell certain freehold premises, and directed the proceeds to the sale to be applied and disposed of in the same manner as his personal estate. A. employed B., as his agent, to make the sale, who, having disposed of the property, paid the proceeds to A., by whom the money was misapplied. It was held that B. was not answerable for this, the money having come to his hands, not in the character of executor, but of agent (b).

6. **Delegation permitted where there is a moral necessity for it.**—And trustees and executors may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it. "There are," said Lord Hardwicke, "two sorts of necessity: first *legal*

Hill's MSS., cited 1 P. W. 241, note (y), 6th ed.; *Chambers v. Minchin*, 7 Ves. 198.

(a) *Kilbee v. Sneyd*, 2 Moll. 199, 200; and see *Doyle v. Blake*, 2 Sch. & Lef. 239, 245.

(b) *Davis v. Spurling*, 1 R. & M. 64; *S. C. Taml.* 199; and see *Crisp v. Spranger*, Nels. 109; *Keane v. Robarts*, 4 Mad. 332, see 356, 359.

necessity; and secondly: *moral* necessity. As to the *first* a distinction prevails. Where two *executors* join in giving a discharge for money, and one of them only receives it, they are both answerable for it; because there is no necessity for both to join in the discharge, the receipt of either being sufficient: but if *trustees* join in giving a discharge, and only one receives, the other is not answerable, because his joining in the discharge was necessary. *Moral* necessity is from the usage of mankind, if the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable; so in the employment of stewards and agents: for none of these cases are on account of necessity, but because the persons acted in the usual method of business" (c). And Lord Loughborough in very similar terms observed, "If the business was transacted in the *ordinary* manner, unless there were some circumstances to create suspicion, surely the allowance is fair" (d). "Necessity," said Lord Cottenham, "which includes the *regular course of business*, will exonerate" (e). And Lord [*255] Redesdale, * in the same spirit observed, "An executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay those debts: he is considered to do this of *necessity*: he could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted money to a person to whom he would himself have given credit, and would in his own business have remitted money in the same way" (a).

Ex parte Griffin.—In conformity with these principles, where A. and B. were assignees of a bankrupt, and A. signed

(c) *Ex parte* Belchier, Amb. 219; [Re Speight, 22 Ch. D. 727; 9 App. Cas. 1.]

(d) Bacon v. Bacon, 5 Ves. 335.

(e) Clough v. Bond, 3 M. & Cr. 497.

(a) Joy v. Campbell, 1 Sch. & Lef. 341; and see [Re Speight, 22 Ch. D.

727; 9 App. Cas. 1;] Bacon v. Bacon, 5 Ves. 331, and compare Chambers v. Minchin, 7 Ves. 193, and Langford v. Gascoyne, 11 Ves. 335; and see Davis v. Spurling, 1 R. & M. 66; Munch v. Cockerell, 5 M. & Cr. 214; Re Bird, 16 L. R. Eq. 203.

the dividend cheques upon the bankers in favour of the creditors, and delivered them to B., who undertook to affix his signature, and deliver them to the creditors, and B. accordingly signed the cheques, and placed them in his desk, whence they were stolen, and presented at the bank, and paid; on an application to the Court to make A. answerable, Sir J. Leach was of opinion that the delivery of the cheques by A. to B. as his co-assignee, was an act done of necessity in the course of business, and that he was not responsible for the subsequent loss of the cheques (*b*).

[*Re Speight*. — So where a trustee employed a broker in the ordinary course of business, to invest trust funds in proper securities authorized by the trust, and on receipt of the bought note handed over a cheque for the purchase-money to the broker, who misappropriated it, the trustee was not liable to make good the loss (*c*). But a trustee negotiating with a municipal corporation through a broker, for a *direct loan* to them, would not be justified in handing over the money to the broker for payment to the corporation, for "there would be no moral necessity or sufficient practical reason from the usage of mankind or otherwise," to justify such a course (*d*).]

7. *Ex parte Townsend*. — But where the assignees of a bankrupt employed an *attorney* to recover debts due to the estate, and the attorney brought actions and received the money and absconded, Sir A. Hart held them accountable on the ground that there was *no necessity* for permitting the attorney to receive one shilling of the money recovered further than his costs, and laid it down, that if the attorney received the *money one day and become [*256] insolvent the next, the assignee would be liable. And his Lordship said the same point had been decided in an unreported case before Lord Eldon (*a*). Trustees, undoubtedly must not let the money *lie* in the hands of the

(*b*) *Ex parte Griffin*, 2 Gl. & J. 114; and see *Wackerbath v. Powell*, Buck, 496; S. C. 2 Gl. & J. 151; *Kilbee v. Sneyd*, 2 Moll. 186.

[(*c*) *Re Speight*, 22 Ch. D. 727; 9 App. Cas. 1.]

[(*d*) *Re Speight, ubi sup.*]

(*a*) *Ex parte Townsend*, 1 Moll. 189; see *Anon. case*, 12 Mod. 560; *Re Fryer*, 3 K. & J. 317.

attorney, but that they must not suffer it to pass through his hands in the ordinary course of business, in the recovery of a debt by *action*, was beyond any previous decision; unless, as suggested, it had been so ruled by Lord Eldon. However, we have here the authority of Sir A. Hart, that the plaintiffs' attorney in an action cannot *virtute officii* sign a discharge, and that if the plaintiffs empower him to receive the amount recovered, they are answerable for his receipts as for the act of an agent improperly appointed to sign such receipt.

8. **Trustee not to require security from his agent.** — A trustee or executor is not called upon to take any *security* from the agent; for to do that upon every occasion would tend greatly to the hindrance of business (*b*).

[If a trustee employs an agent under circumstances which justify the employment, and a loss arises from the insolvency of the agent, the *onus* is on the persons seeking to make the trustee liable for the loss, to show that it was attributable to the default of the trustee (*c*).]

9. **How trust money to be transmitted.** — Where trust money is to be transmitted to a distance, the trustee may do it most conveniently and securely through the medium of a responsible bank, or he may take bills drawn by a person of undoubted credit, and payable at the place whither the money is to be sent (*d*).

10. **Payments into bank must be to the account of the trust.** — But the money must be paid in to the account of the *trust estate*, and the bills must be taken in favour of the trustee *in that character*, and if he neglect these precautions, then, if the bank break, or the bills be dishonoured, the trustee will be liable for the loss to *the cestuis que trust* (*e*).

11. **Rule at law as to liability of executors.** — The rule formerly applied to *executors* in a Court of law seems to have been somewhat different from that established in Courts of

(*b*) *Ex parte* Belchier, Amb. 220, per Lord Hardwicke.

(*c*) *Re* Brier, 26 Ch. D. 238.]

(*d*) *Knight v. E. of Plymouth*, 1 Dick. 120; S. C. 3 Atk. 480; recognized *Ex parte* Belchier, Amb. 219,

and *Routh v. Howell*, 3 Ves. 566; *Joy v. Campbell*, 1 Sch. & Lef. 341; and see *Wren v. Kirton*, 11 Ves. 380, 385.

(*e*) See *Wren v. Kirton*, 11 Ves. 380, 381; *Massey v. Banner*, 1 J. & W. 247.

Equity. An executor once become responsible by actual receipt of any part of the assets could not at law have founded his discharge in respect thereof as against a creditor, either by a plea of reasonable confidence disappointed, or a loss not occasioned by any negligence or default; as if an executor transmitted a sum to *his co-executor [*257] under circumstances that in equity would have justified the confidence, a Court of law would still have held him responsible for any misapplication by the co-executor, and could not allow him to plead *plene administravit* (a). But now that [the rules of equity prevail over the rules of the common law where they conflict, the distinction has disappeared (b).]

12. *Delegation of a discretionary trust.* — If the trust be of a *discretionary* character, not only is the trustee answerable for all the mischievous consequences of the delegation, but the exercise of the discretion by the substitute will be actually void (c).

Thus an advowson was vested in twenty-five of the principal inhabitants of a parish upon trust to elect and present a proper preacher, and some of the trustees having deputed *proxies* to vote at the election, Lord Hardwicke held that, as the election had been conducted in this manner, it could not be supported (d).

[Trustees may however enquire what are the wishes and opinions of others, especially of those who are interested, before finally determining what in the exercise of their own discretion they think expedient, and will not be held to act against their own judgment, if they should in the end disregard objections to which they had previously given weight (e).]

13. *Not permitted, though to a co-trustee.* — And a *discretionary* trust can no more be delegated to a *co-executor* or *co-*

(a) *Crosse v. Smith*, 7 East, 246; and see *Jones v. Lewis*, 2 Ves. 241.

[(b) 36 & 37 Vict. c. 66, s. 25, subs. 11; *Job v. Job*, 6 Ch. D. 562; and see *Re Radcliffe*, 7 Ch. D. 733.]

(c) See *Alexander v. Alexander*, 2 Ves. 643; *Bradford v. Belfield*, 2

Sim, 264; *Hitch v. Leworthy*, 2 Hare, 200.

(d) *Attorney-General v. Scott*, 1 Ves. 413, see 417; *Wilson v. Dennison*, Amb. 82; S. C. 7 B. P. C. 296.

[(e) *Fraser v. Murdoch*, 6 App. Cas. 855.]

trustee than to a stranger (*f*). Thus, where a sum of money was given to three executors upon trust to distribute in charity at their discretion, and the executors assumed each the independent control of one-third, Lord Hardwicke said, "I am of opinion the executors could not divide the charity into three parts, and each executor nominate a third absolutely, because the determination of the property of *every* object was left by the testator to the direction of *all* the executors" (*g*).

14. **Transfer of the trust estate does not transfer the power.** — Of course if a trustee convey the estate, the mere transfer of the estate will not have the effect of carrying with it the trust or power to the grantee (*h*). And so if a [*258] trustee devise the estate, the *devisee cannot administer a discretionary trust unless the original settlement contemplated such an event, and by vesting the powers in the trustee and his assigns annexed the powers to the estate in the hands of the devisee (*a*).

15. **Delegation distinguished from appointment of a proxy.** — It must be noticed that the appointment of an *attorney* or *proxy* is not in all cases a *delegation* of the *trust*. When the trustee has resolved in his own mind in what manner to exercise his discretion, he cannot be said to delegate any part of the confidence if he merely execute the deed by attorney, or signify his will by proxy. Thus, in the case before cited (*b*) where the trust was to elect and present a proper clerk to a benefice, Lord Hardwicke had no doubt that so far as related to the mere act of presentation, the trustees, having themselves fixed upon the object, might have signed the presentation by proxy; "a trustee who had a legal estate might make an attorney to do legal acts."

(*f*) *Crewe v. Dicken*, 4 Ves. 97.

(*g*) *Attorney-General v. Gleg*, 1 Atk. 356.

(*h*) *Crewe v. Dicken*, 4 Ves. 97, see 100; *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Bradford v. Belfield*, 2 Sim. 264; *Cole v. Wade*, 16 Ves. 47, *per* Sir W. Grant; *Kingham*

v. Lee, 15 Sim. 400, *per* Sir L. Shadwell.

(*a*) *Re Burt's Estate*, 1 Drew. 319; and see *ante*, p. 230, 231; [but see *Osborne to Rowlett*, 13 Ch. D. 774.]

(*b*) *Attorney-General v. Scott*, 1 Ves. 413; and see *Ex parte Rigby*, 19 Ves. 463.

[16. **Appointment of Surveyor.**— Trustees who are exercising the statutory power of sale conferred by the Lands Clauses Consolidation Act, 1845, cannot appoint one of themselves to be the surveyor to value the land under the 9th section of the act, for the appointment of a surveyor under that section is intended as a check on the action of the trustees (c).]

Thirdly. In the case of co-trustees the office is a *joint* one.¹

1. **Trust a joint office.**— Where the administration of the trust is vested in *co-trustees*, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their *joint* capacity (d). It is not uncommon to

[(c) *Peters v. Lewes and East* (d) See *Ex parte Griffin*, 2 Gl. & Grinstead Railway Company, 16 Ch. J. 116.
D. 703, 18 Ch. D. 429.]

¹ *Co-trustees.*— Where there are two or more trustees, they must act jointly; *Austin v. Shaw*, 10 Allen, 552; *Vandever's App.* 8 Watts and S. 405; 42 Am. Dec. 305; *Low v. Perkins*, 10 Vt. 532; 33 Am. Dec. 217; *Smith v. Wildman*, 37 Conn. 384; *Cox v. Walker*, 26 Me. 504; *King v. Stow*, 6 Johns. Ch. 323; *White v. Watkins*, 23 Mo. 423; *Holcomb v. Holcomb*, 3 Stock. 281. If any trustee, who has accepted, refuses to act, or for any reason is incapacitated, the others cannot act, but must apply to court for relief; *Guyton v. Shane*, 7 Dana, 498; *Ridgeley v. Johnson*, 11 Barb. 527; *Wood v. Wood*, 5 Paige, 596; *Scruggs v. Driver*, 31 Ala. 274; *Smith v. Wildman*, 37 Conn. 384; one trustee cannot convey or pledge without the assent of the others, and one taking with notice gets no title; *Ham v. Ham*, 58 N. H. 70; *Learned v. Welton*, 40 Cal. 349; a compromise by one co-trustee only is void; *Boston v. Robbins*, 126 Mass. 384. The rules as to joint action are less strict in America than in England; the payment of a mortgage to one co-trustee is a good payment; *Bowes v. Seeger*, 8 Watts & S. 222; all trustees must join in conveyance of land, and if they do not there is no conveyance, even *pro tanto*; *Sinclair v. Jackson*, 8 Cow. 543; if a deed is not signed by all the trustees, the grantee must show that the others are dead; *Burngarner v. Coggsell*, 49 Mo. 259; *Learned v. Welton*, 40 Cal. 349; though it has been held that the assent of all the trustees may in some cases be presumed; *Vandever's App.* 8 Watts & S. 405. Whether checks must be signed by all the trustees depends upon the manner in which the deposits are made and the arrangement with the bank; though a conveyance by one co-trustee is defective, yet if there is an entry thereunder, it is sufficient to cause the Statute of Limitations to run against the trustees and *cestui que trust*; *Smilie v. Biffle*, 2 Pa. St. 52; 44 Am. Dec. 156. In all private trusts, unless modified by statutes, all the trustees must concur; *Moore v. Ewing*, Coxe, 144; 1 Am. Dec. 195; *Blin v. Hay*, 2 Tyler, 304; 4 Am. Dec. 738; *Towne v. Jaquith*, 6 Mass. 46; 4 Am. Dec. 84; *Green v. Miller*, 6 Johns. 39; 5 Am. Dec. 184; *Patterson v. Leavitt*, 4 Conn. 50; 10 Am. Dec.

hear one of several trustees spoken of as the *acting* trustee, but the Court knows no such distinction; all who accept the office are in the eyes of the law acting trustees. If any one refuse or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court (*e*). However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both (*f*). But such sanction or approval must be strictly proved (*g*).

[*259] * [2. **Notice of renewal.** — Notice of an intention to exercise a right of renewal of a lease of property vested in several trustees is good if served upon one only of the trustees (*a*).]

3. **Receipts.** — A receipt for money must, in the absence of a receipt clause specially worded, receive the joint authentication of the whole body of trustees, and not of the majority merely, or it will not be valid (*b*). And therefore where the trustees are numerous, it is common in orders of

(*e*) *Doyly v. Sherratt*, 2 Eq. Ca. Ab. 742, marginal note to (D). *Re Congregational Church*, *Smethwick*, W. N. 1866, p. 196; [*Luke v. South Kensington Hotel Company*, 7 Ch. D. 789; 11 Ch. D. 121.]

(*f*) *Messeena v. Carr*, 9 L. R. Eq. 260.

(*g*) See *Lee v. Sankey*, 15 L. R. Eq. 204.

[(*a*) *Nicholson v. Smith*, 22 Ch. D. 640.]

(*b*) *Walker v. Symonds*, 3 Sw. 63; *Hall v. Franck*, 11 Beav. 519; *Lee v. Sankey*, 15 L. R. Eq. 204.

98; but the majority may act when it is expressly authorized by will; *Crane v. Decker*, 22 Hun, 452.

Public trusts. — The majority of the trustees of a public trust control, and may act for the whole, but all must meet or have an opportunity to meet and deliberate; *Commissioners v. Lecky*, 6 Serg. & R. 170; 9 Am. Dec. 418; *State Road in Lehigh & Bucks Cos.* 60 Pa. St. 330; and all must have been appointed and sworn before any can act; *M'Cready v. Guardians of the Poor*, 9 Serg. & R. 94; 11 Am. Dec. 667. The acts of the majority must be within the scope of their powers; *Sloo v. Law*, 3 Blatch. 459; *Ward v. Hopwell*, 3 Gif. 547. If the instrument creating the trust authorizes the majority, or any specific number, to act, they may do so, and their acts will have the same effect and validity as if the action was unanimous; *Taylor v. Dickinson*, 15 Ia. 483. Trustee will not be allowed to avoid the performance of purely ministerial acts reasonably required, but in matters of discretion the courts will give them much greater latitude; *Burrill v. Sheil*, 2 Barb. 457; *In re Mechanics' Bank*, 2 Barb. 446.

the Court to insert a special direction that the moneys *may* be paid to any two or more of them (*e*).

4. **All the trustees must prove.** — Again, if a debtor to the trust become bankrupt, *all* the trustees should join in the proof (*d*), but under particular circumstances the Court will make an order for *some* of the trustees to prove, but even then the Court has occasionally inserted a direction that the dividends shall be *payable* to *all* the trustees (*e*).

5. **Acknowledgment of debt by one trustee.** — If a mortgage be made to two trustees so described and the statutory period elapse, an interim acknowledgment by *one* of the trustees will not prevent the operation of the Statute of Limitations in bar of redemption (*f*).

6. **In public trusts the majority of the trustees may bind the rest.** — Where there are several trustees, and the trust is of a *public* character, the act of the *majority* is held to be the act of the whole number (*g*); as where there were seven trustees and they met for the purpose of electing a school-master, and at the meeting five of the trustees concurred in the appointment, but two dissented, the act of the majority was considered to bind the minority (*h*). But of course the act of the majority does not bind the minority, so far as the act is beyond the proper sphere of the duty of the trustees (*i*). And when a *special* power is given to trustees, it cannot be exercised by the majority only, but *all* must join (*j*). Now, by 32 & 33 Vict. c. 110, s. 12, it is enacted that a *majority* of *charity* trustees present at a meeting duly constituted, and voting, shall have and be deemed to have always had the same power of disposition over the charity property, as if it were the act of the whole body; and by

(c) Attorney-General v. Brickdale, 8 Beav. 223.

(d) *Ex parte* Smith, 1 Deac. 391, per Sir T. Erskine.

(e) *Ex parte* Smith, 1 Deac. 385.

(f) Richardson v. Younge, 6 L. R. Ch. App. 478.

(g) Wilkinson v. Malin, 2 Tyr. 544; Perry v. Shipway, 1 Giff. 1; and see Attorney-General v. Shearman, 2 Beav. 104; Attorney-General v. Cum-

ing, 2 Y. & C. C. C. 139; Younger v. Welham, 3 Sw. 180.

(h) Wilkinson v. Malin, 2 Tyr. 572. As to the power of a majority of two-thirds of the trustees to pass the legal estate, see 23 & 24 Vict. c. 136, s. 16, and *post*.

(i) Ward v. Hipwell, 3 Giff. 547.

(j) See *Re* Congregational Church. Smethwick, W. N. 1866, p. 196.

[*260] *the 13th section the majority of the charity trustees may, with the sanction of the charity commissioners, *sue*, as if they were the sole trustees.

7. **Trustees of charities.** — Where a numerous body are appointed trustees by the Court, as in cases of charity, the Court sometimes, for greater convenience, annexes to the order a direction that part of them shall form a *quorum*.

8. **Dividends and rents.** — If *stock* be standing in the names of several co-trustees, then, as they are joint tenants, and the Bank does not recognize the trust, any *one* of them may receive the *dividends*, though all must join in the sale of the *corpus*; and the Court itself has occasionally directed the dividends of stock, standing under its control, to be paid to one of several trustees (*a*). And in the case of Bank annuities standing to the credit of trustees of a charity, the Court to prevent the necessity of recurring applications on changes of trustees, made an order for payment of the dividends “to the trustees or any two of them, or to other the trustees for the time being or any two of them” (*b*), and in another case for payment to the “trustees for the time being or one of them” (*c*). Where there are co-trustees of *lands*, any one of them may receive the rents, though all must concur in a conveyance (*d*). But if there be two trustees, and one of them receives the rents and misapplies them, and the other trustee has notice of this, it is the duty of such other trustee to serve a notice on the tenants not to pay their rents to the defaulting trustee alone, and if he omit to do this or to take the necessary steps for insuring the safety of the rents, as against the defaulting trustee, he will himself become liable (*e*).

9. **Co-trustees should not sever in legal proceedings.** — As co-trustees are a joint body, the Court requires them, unless under special circumstances, to defend a suit jointly, and if

(*a*) *Re Coulson's Settlement*, 17 L. T. N. S. 27.

(*b*) *Milne v. Gilbert*, W. N. 1875, p. 128.

(*c*) *In re Foy's Trusts*, 33 L. T. N. S. 161; 23 W. R. 744.

(*d*) See *Townley v. Sherborne*,

Bridg. 35; *Williams v. Nixon*, 2 Beav. 472; *Gouldsworth v. Knight*, 11 M. & W. 337.

(*e*) *Gough v. Smith*, W. N. 1872, p. 18; reversed under a different state of circumstances, W. N. 1872, p. 66.

they sever, the extra costs thereby occasioned must be borne by the defaulting party (*f*). It is conceived that this rule, so strictly observed in Court, must not be lost sight of in transactions out of Court, and that co-trustees are bound, unless they can show good reason to the contrary, to act by the same *solicitor* and the * same *counsel*. It [*261] would be a strange anomaly if four trustees were allowed only one solicitor and one counsel in Court, and four separate solicitors and four separate counsel out of Court. Every trustee should be prepared to act in harmony with his co-trustees, or he should not accept the office. It may be said that as each trustee is responsible for the due administration of the trust, he ought to be at liberty to employ a professional adviser of his own choosing, but this argument would *a fortiori* apply to so important a matter as the defence of a suit, and yet there the Court pays no attention to it.

Fourthly. On the death of one trustee the joint office *survives*.¹

1. **Survivorship of the trust.**—It is a well-known maxim that a *bare authority* committed to several persons is determined by the death of any one; but, if coupled with an *interest*, it passes to the survivors (*a*). Thus, the committees of a lunatic's estate are regarded in the light of mere bailiffs

[(*f*) If one of the trustees be a defaulter or indebted to the trust estate, the other trustees will be justified in severing from him, *Smith v. Dale*, 18 Ch. D. 516, 518.]

(*a*) Co. Lit. 113 a, 181 b; *Butler v. Bray*, Dyer, 189 b; *Attorney-General v. Gleg*, 1 Atk. 356; S. C. Amb. 584; *Goulds*, 2, pl. 4; *Peyton v. Bury*, 2 P. W. 628; *Mansell v. Vaughan*, Wilm. 49; *Eyre v. Countess of Shaftes-*

bury, 2 P. W. 108, 121, 124. [In the case of executors and trusts constituted after or created by instruments coming into operation after the 31st Dec. 1881, 44 & 45 Vict. c. 41, s. 38, provides that a power or trust given to two or more executors or trustees jointly, may, subject to any direction to the contrary, be exercised or performed by the survivor or survivors for the time being.]

¹ A naked authority ceases at the death of the one having it, but if coupled with an interest, as in the case of co-trustees, it survives; *Gregg v. Currier*, 36 N. H. 200; *De Peyster v. Ferrers*, 11 Paige, 13; *Parsons v. Boyd*, 20 Ala. 112; *Aubuchon v. Lory*, 23 Mo. 99; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; on the death of one co-trustee, the whole authority and power devolves upon the survivor; *Golder v. Bressler*, 105 Ill. 419; *Nichols v. Campbell*, 10 Gratt. 560.

without a spark of interest, and if one of them die, the office is immediately extinguished (*b*). [And where under an order for maintenance two trustees were directed to pay the income of a trust fund to the mother of an infant for the maintenance of the infant during her minority, and one of the trustees died and the survivor continued the payments, it was held by the late M. R. that the trust for maintenance arose only under the order and did not survive (*c*). But this view was not acquiesced in by the Court of Appeal, where a distinction was drawn between a power and a positive direction involving no discretion (*d*).] But an executorship or administratorship survives (*e*); for "if," says Lord Talbot, "a joint estate at law will survive, why shall not a joint administration, when they both have a joint estate in it?" (*f*). So a *testamentary* guardianship vests in the survivors, for, as guardians may bring actions and avow in their own names, may grant leases during the minority of the ward, and demise copyholds even in reversion as [*262] lords *pro tempore*, it is evident they have an *interest (*a*). It follows that as co-trustees have an authority coupled with an estate or interest, their office also must be impressed with the quality of survivorship (*b*): as if land be vested in two trustees upon trust to sell and one of them dies, the other may sell (*c*); and if an advowson be conveyed to trustees upon trust to present a proper clerk, the survivors or survivor may present (*d*). Otherwise,

(*b*) *Ex parte Lyne*, Cas. t. Talbot, 143.

[(*c*) *Brown v. Smith*, 10 Ch. D. 377; 46 L. J. N. S. Ch. 866.]

[(*d*) S. C. 10 Ch. D. 377, 382.]

(*e*) *Adams v. Buckland*, 2 Vern. 514; *Hudson v. Hudson*, Cas. t. Talb. 127.

(*f*) *Hudson v. Hudson*, Cas. t. Talb. 129.

(*a*) *Eyre v. Countess of Shaftesbury*, 2 P. W. 102. But if joint guardians be appointed by the Court, the office, on the death of one, is at an end; *Bradshaw v. Bradshaw*, 1 Russ. 528; *Hall v. Jones*, 2 Sim. 41.

(*b*) *Hudson v. Hudson*, Cas. t. Talb. 129, *per* Lord Talbot; Co. Lit. 113 a; *Attorney-General v. Glegg*, Amb. 585, *per* Lord Hardwicke; *Gwilliams v. Rowel*, Hard. 204; *Billingsley v. Mathew*, Toth. 168.

(*c*) See Co. Lit. 113 a; *Warburton v. Sandys*, 14 Sim. 622; *Watson v. Pearson*, 2 Exch. 594.

(*d*) See *Attorney-General v. Bishop of Litchfield*, 5 Ves. 825; *Attorney-General v. Cuming*, 2 Y. & C. C. C. 139. If two trustees employ a solicitor, the surviving trustee may obtain a decree for an account against the solicitor without making the repre-

indeed, the more precaution a person took by increasing the number of the trustees, the greater would be the chance of the abrupt determination of the trust by the death of any one. Even where the trust was to raise the sum of 2000*l.* out of the testator's estate "by sale or otherwise, at the discretion of his *trustees*, who should invest the same in the names of the said trustees upon trust," &c., and one of the two trustees died, and the survivor sold; Vice Chancellor Wood decided that the survivor could make a good title. "I find," he said, "a clear estate in the vendor, and a clear duty to perform. Is it to be said that the sale is a breach of trust because the co-trustee is dead? If I were to lay down such a rule, it would come to this, that wherever an estate was vested in two or more trustees to raise a sum by sale or mortgage, you must come to the Court on the death of one of the trustees" (*e*).

2. **Trust survives, though there be a power of appointment of new trustees.**—The survivorship of the trust will not be defeated because the settlement contains a power for restoring the original number of trustees by new appointments (*f*): unless there be something in the instrument that specially manifests such an intention (*g*). Even in an Act of Parliament, which declared in very strong terms that the survivors *should* (*h*), and *they were thereby required* to appoint new trustees, the Court said the proviso was analogous to the * common one in settlements, and expressed an [*263] opinion (for the decision was upon another point), that the clause was not imperative, but merely of a directory character (*a*).

sentative of the deceased trustee a party; *Slater v. Wheeler*, 9 Sim. 156.

(*e*) *Lane v. Debenham*, 11 Hare, 188; and see *Hind v. Poole*, 1 K. & J. 383.

(*f*) See *Doe v. Godwin*, 1 D. & R. 259; *Warburton v. Sandys*, 14 Sim. 622; compare *Townsend v. Wilson*, 1 B. & Ald. 608, with *Hall v. Dewes*, Jac. 193; and see *Attorney-General v. Floyer*, 2 Vern. 748; *Jacob v.*

Lucas, 1 Beav. 486; *Attorney-General v. Cuming*, 2 Y. & C. C. C. 139.

(*g*) *Foley v. Wontner*, 2 J. & W. 245; and see *Jacob v. Lucas*, 1 Beav. 436.

(*h*) As to the force of the words "shall and may" in an Act of Parliament, see *Attorney-General v. Lock*, 3 Atk. 166; *Stamper v. Millar*, Id. 212; *Rex v. Flockwood*, 2 Chit. Rep. 252.

(*a*) *Doe v. Godwin*, 1 D. & R. 259.

Fifthly. Trustee not liable for his co-trustee.—One trustee shall not be *liable* for the acts or defaults of his *co-trustee*.¹

¹ *Liability of co-trustees.*—The same rule prevails in America as laid down in the text, that a co-trustee is not liable for the acts of his associates; *Peter v. Beverly*, 10 Pet. 532; *Taylor v. Benham*, 5 How. 233; *Vandever's App.*, 8 Watts & S. 405; *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Boyd v. Boyd*, 3 Gratt. 114; *Ray v. Doughty*, 4 Blackf. 115; *Royall v. McKenzie*, 25 Ala. 363; *State v. Guilford*, 18 Ohio, 509; these same cases hold that if the trustees join in signing receipts, they are each responsible; but if any sign simply because that formality is required of them, and the others take all the money, those who do not receive the money are not liable for its misapplication; *Stowe v. Bowen*, 90 Mass. 194; *Monell v. Monell*, 5 Johns. Ch. 233; *Griffin v. Macaulay*, 7 Gratt. 476; *Gray v. Reamer*, 11 Bush. 113; *Irwin's App.* 35 Pa. St. 294; *Kip v. Deniston*, 4 Johns. 22; the burden of proving the facts is on the trustee seeking to avoid responsibility; *Manahan v. Gibbons*, 19 Johns. 427; *Hall v. Carter*, 8 Ga. 388; it is not always expected that all the trustees are to engage actively in the management of the trust, and the management may be left to one of them; *Jones' App.* 8 Watts & S. 143; *Ray v. Doughty*, 4 Blackf. 115; *Ochiltree v. Wright*, 1 Dev. & B. Eq. 336; or they may divide their duties, and each become liable for his acts only. And if it is necessary that money should be handled by one, the others may not be liable for his misdeeds. If the trustees agree to be mutually responsible, they will be bound by their agreement; *Towne v. Ammidown*, 20 Pick. 535; *Brazer v. Clark*, 5 Pick. 96. Every trustee should have some knowledge of the administration of the trust, and must not knowingly allow injudicious management; *Clark v. Clark*, 8 Paige, 153, and if the trust deed excuses them from liability in such cases, they will nevertheless continue to be liable, as in an apparent joint accounting which is incorrect; *Clark's App.* 6 Harris, 175; *Hengst's App.* 12 Harris, 413; if a will makes them jointly liable under all circumstances, they can only avoid liability by refusing to accept the trust, or by getting relieved from the trusteeship by one of methods previously mentioned; *Wood v. Wood*, 5 Paige, 596; *Contee v. Dawson*, 2 Bland, 264.

If a trustee knowing him to be unfit allows his co-trustee to attend solely to the active management of the trust, or to receive all the funds, he may be held liable because of his own negligence; *Wayman v. Jones*, 4 Md. Ch. 500; *Pim v. Downing*, 11 Serg. & R. 71; *Elmendorf v. Lansing*, 4 Johns. Ch. 562; the test being, the knowledge of such facts as ought to put a man on his guard; *Jones' App.* 8 Watts & S. 147. Every trustee ought to know the condition of the trust fund; *Bates v. Underhill*, 3 Redf. 365; and himself see to the application of the trust funds coming into his hands; *Edmonds v. Crenshaw*, 14 Pet. 166; *Deaderick v. Cantrell*, 10 Yerg. 263; *Sparhawk v. Buell*, 9 Vt. 41; *Mumford v. Murray*, 6 Johns. Ch. 1; *Hughlett v. Hughlett*, 5 Humph. 453; a trustee will be responsible if he knowingly allows a misapplication of the trust funds; *Hilles's Est.* 13 Phila. 402; *Bates v. Underhill*, 3 Redf. 365; *Schenck v. Schenck*, 1 Green, Ch. 174; a trustee knowing of any breach of trust, or misconduct of his co-trustee must either remedy the difficulty himself or apply to the court for relief; *Crane v. Hearn*, 26 N. J. Eq. 378; if he pays over money to his co-trustee he will be liable for it; *Glenn v. McKim*, 3 Gill, 366; *Graham v. Davidson*, 2 Dev. & B. Eq. 155; *Graham v. Austin*, 2 Gratt. 273. Some authorities hold that if all the trustees join in a sale, and one receives the money, all will be responsible, on the ground that a

1. **Townley v. Sherborne.** — This canon appears to have been first established by the case of *Townley v. Sherborne* (b) in the reign of Charles the First.

A., B., C. and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and *signed acquittances*; but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands? “The *Lord Keeper Coventry*” (says the reporter) “considered the case to be of great consequence, and thought not to determine the same suddenly, but to advise thereof, and desired *the Lords the Judges Assistant* to take the same into their serious consideration, whereby some course might be settled that parties trustees might not be too much punished, lest it should dishearten men to take any trust, which would be inconvenient on the one side, nor that too much liberty should be given to parties trustees, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side. And the *Lord Keeper and the Lords the Judges Assistant* afterwards conferring together, and upon mature deliberation conceiving the case to be of great importance, his Lordship was pleased to call unto him also *Mr. Justice Crook, Mr. Justice Barclay, and Mr. Justice Crawley*, for their assistance

(b) *Bridg. 35*; and see *Leigh v. Barry*, 3 *Atk.* 584; *Anon. case*, 12 *Mod.* 560.

trustee is always responsible for any act in which he takes part; *Maccubbin v. Cromwell*, 7 *G. & J.* 157; *Spencer v. Spencer*, 11 *Paige*, 299; *Hauser v. Lehman*, 2 *Ired. Eq.* 594; but the bulk of authorities make no distinction between these and the receipts for trust funds; *Atcheson v. Robertson*, 3 *Rich. Eq.* 132; *Kep v. Deniston*, 14 *Johns.* 23; *Griffin v. Macauley*, 7 *Gratt.* 476; see *Ringgold v. Ringgold*, 1 *H. & G.* 11; if a proper investment is once made, the joint liability terminates; *Glenn v. McKim*, 3 *Gill*, 366; there is no liability on the part of one who has renounced the trust; *Claggett v. Hail*, 9 *G. & J.* 80; nor is the estate of a deceased trustee liable; *Towne v. Ammidown*, 20 *Pick.* 535. See also as to liability of co-trustees; *McCarter v. McCarter*, 7 *O. R.* 243; *Crowler v. Hinman*, 10 *O. R.* 159; *Burritt v. Burritt*, 29 *Chy.* 321; *Ratz v. Tylee*, 11 *Chy.* 342; *Mitchell v. Ritchey*, 12 *Chy.* 88; *Mickleburgh v. Parker*, 17 *Chy.* 503; *McKelvey v. Rourke*, 15 *Chy.* 380; *Henderson v. Woods*, 9 *Chy.* 539.

also in the same, and *appointed precedents to be looked over* as well in the Court of Chancery as in other courts, if any could be found touching the point in question; whereupon several precedents were produced before them, some in Court of Chancery and some in the Court of Wards, where parties trustees were chargeable only according to their several and respective receipts, and not one to answer for the other, but no precedent to the contrary was produced to them. Whereupon his Lordship, after *long and mature deliberation on the case, and serious advice with all the said Judges*, did this day

in open Court declare the resolution of his Lordship [*264] and the said Judges — That where lands *or leases

were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayed in his estate, his co-trustee shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust; *for they being by law joint tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by*. It is no breach of trust to permit one of the trustees to *receive* all or the most part of the profits, it falling out many times that some of the trustees live far from the lands and are put in trust out of other respects than to be troubled with the receipt of the profits. But his Lordship and the said Judges did resolve, that if upon the proofs or circumstances the Court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing."

2. **Trustee not liable for joining pro formâ in receipts.** — Co-trustees (a), (as was determined in *Townley v. Sherborne*.) were *formerly* considered responsible for money if they joined in *signing the receipt* for it; but in later times the rule has

(a) *Townley v. Sherborne*, Bridg. 35; *Spalding v. Shalmer*, 1 Vern. 303; *Sadler v. Hobbs*, 2 B. C. C. 114; and see *Bradwell v. Catchpole*, cited

Walker v. Symonds, 3 Sw. 78, note (a); but said by Lord Cowper, *Fellows v. Mitchell*, 2 Vern. 516, to be contrary to natural justice.

been established, that a trustee who joins in a receipt for conformity, but without receiving, shall not be answerable for a misapplication by the trustee who receives (*b*). Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline.

3. **But he must prove that he did not actually receive.** — But it lies upon a trustee who joins in a receipt to show that the money acknowledged to have been received by all was *in fact received by the other or others, and that [*265] he himself joined only for conformity (*a*). In the absence of all evidence, the effect of a joint receipt is to charge each of the trustees *in solido*; as if a mortgage be devised to three trustees, and the mortgagor with his witness meets them to pay it off, and the money is laid on the table, and the mortgagor having obtained a reconveyance and receipt for his money, withdraws, each of the trustees in this case will be answerable for the whole (*b*). A joint receipt at law is conclusive evidence that the money came to the hands of both, but a Court of equity, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact (*c*). “Where,” said Lord Cowper, “it cannot

(*b*) *In re Fryer*, 3 K. & J. 317; *Brice v. Stokes*, 11 Ves. 324, *per* Lord Eldon; *Harden v. Parsons*, 1 Eden, 147, *per* Lord Northington; *Westley v. Clarke*, 1 Eden, 359, *per eundem*; *Heaton v. Marriot*, cited *Aplyn v. Brewer*, Pr. Ch. 173; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Leigh v. Barry*, 3 Atk. 584, *per eundem*; *Fellows v. Mitchell*, 1 P. W. 81; *Gregory v. Gregory*, 2 Y. & C. 316, *per* Baron Alderson; *Sadler v. Hobbs*, 2 B. C. C. 117, *per* Lord Thurlow; *Chambers v. Minchin*, 7 Ves. 198, *per* Lord Eldon; *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 479, *per eundem*; *Harrison v. Graham*, 3 Hill's MSS. 239, *per* Lord Hardwicke, cited 1 P.

W. 241, 6th ed. note (*y*); *Carsey v. Barsham*, cited *Joy v. Campbell*, 1 Sch. & Lef. 344, *per eundem*; *Anon. case*, Mosely, 35; *Ex parte Wackerbath*, 2 Gl. & J. 151. [But see *Re Flower and the Metropolitan Board of Works*, 27 Ch. D. 592, where *Kay, J.*, seems to have entertained the opposite opinion; and see *post*, p. 292.]

(*a*) *Brice v. Stokes*, 11 Ves. 234, *per* Lord Eldon; and see *Scurfield v. Howes*, 3 B. C. C. 95, *Belt's Edition*, note (8).

(*b*) *Westley v. Clarke*, 1 Eden, 359, *per* Lord Henley.

(*c*) *Harden v. Parsons*, 1 Eden, 147, *per eundem*; *Wilson v. Keating*, 4 De G. & J. 593, *per Cur.*

be distinguished how much was received by one trustee and how much by the other, it is like throwing corn or money into another man's heap, where there is no reason that he who made this difficulty should have the whole; on the contrary, because it cannot be distinguished he shall have no part" (d).

4. Trustee joining in a receipt must not permit the money to lie in the hands of the co-trustee. — And though a trustee joining in a receipt may be safe in *merely permitting* his co-trustee to *receive* in the first instance, yet he will not be justified in allowing the money to *remain* in his hands for a longer period than the circumstances of the case reasonably require (e). And it is the duty of a trustee not to rely on a mere statement by his co-trustee, that the money has been duly invested, but to ascertain that such is the fact (f). Two trustees authorized a co-trustee to remove from their bankers a box containing *active* Spanish stock, for the purpose of converting it into *deferred* Spanish stock, and the co-trustee after the conversion returned the box with only a part of the converted stock in it, and the trustees, who relied on the assurance of the co-trustee to their solicitor that all was right, and did not ascertain the fact, were held liable for the deferred stock which had been misappropriated (g).

[*266] * 5. *Walker v. Symonds*. — *Walker v. Symonds* (a) involved an unusual particularity of circumstances; but as Lord Eldon described it as a case of great importance to trustees in general (b), it may be useful to present a summary of it so far as it bears upon the present subject.

A sum of money secured by mortgage had been assigned

(d) *Fellows v. Mitchell*, 1 P. W. 88. For the ordinary and more natural application of this illustration, see *infra*, Ch. XXX. s. 2.

(e) *Brice v. Stokes*, 11 Ves. 319; *Bone v. Cook*, M'Clel. 168; *Gregory v. Gregory*, 2 Y. & C. 313; *Thompson v. Finch*, 22 Beav. 316; *Lincoln v. Wright*, 4 Beav. 427; and see *Re Fryer*, 3 K. & J. 317. This doctrine appears to have been very little re-

garded in the time of Lord Talbot. See *Attorney-General v. Randall*, 21 Vin. Ab. 534.

(f) *Thompson v. Finch*, 22 Beav. 316; 8 De G. M. & G. 560; and see *Hanbury v. Kirkland*, 3 Sim. 265.

(g) *Mendes v. Guedella*, 2 J. & H. 259.

(a) 3 Sw. 1.

(b) 3 Sw. 74.

to Donnithorne, Griffith, and Symonds, upon certain trusts. On 12th January, 1791, the mortgage was paid off and the estate re-conveyed, and a joint receipt signed, and the money, with the approbation of the co-trustees, was put into the hands of Donnithorne. The money was shortly afterwards invested by Donnithorne, with the sanction of his co-trustees, in bills or notes of the East India Company payable at the end of two years. In 1793 the bills were paid off by the Company, and the money received by Donnithorne. Intelligence to that effect having been transmitted to the co-trustees, Symonds the same year wrote to Donnithorne requesting him to invest it in the public funds in the joint names of the trustees. Donnithorne begged that the money might remain in his hands, and proposed to secure the repayment of it by a mortgage from himself and his son of their settled estates in Cornwall, and, until the mortgage could be prepared, to secure it by their joint bond. The co-trustees, conceiving the security to be ample, expressed their consent, and the joint bond was accordingly executed. Donnithorne not having sent the mortgage as he promised, Symonds made several applications to him upon the subject, earnestly desiring him either to invest the money in the funds, or to give them landed security. In September, 1796, Donnithorne died insolvent, and without having executed the mortgage. Sir W. Grant observed, "The money in 1791 was paid in without any act of the trustees: they were obliged to receive it: so far they were blameless. It came to Donnithorne's hands, and *the trustees were not to blame in letting it come to his hands*; but they might have afterwards made themselves responsible by merely not doing what was incumbent on them; by permitting the money to *remain* a considerable time in the hands of their co-trustee they might, without any positive act on their part, have made themselves liable. That will depend on the degree and extent of their *laches* in suffering the money to remain in the hands of Donnithorne. The trustees being authorised to put the money out on mortgage, it would be rather hard to say that they were guilty of *laches* by giving Donnithorne a little time to find a mortgage, taking his

[*267] bond in the mean time. *What passed in the interval between to the death of Donnithorne does not appear. If it were necessary to decide the point, an inquiry before the Master must be directed" (a). Sir W. Grant dismissed the bill, which was to set aside (as having been fraudulently obtained) a compromise of the alleged breach of trust, but did so on grounds foreign to the subject under discussion; Lord Eldon, however, before whom the case was brought upon appeal, reversed Sir W. Grant's decree, and directed an inquiry by the Master as to the conduct of the trustees from January, 1791, when the mortgage was paid off, to 1796, the time of Donnithorne's death. It then appeared by the Master's report, made in pursuance of the order, that the money had been invested by Donnithorne, soon after he had received it, in East India bills *payable to himself*; that the money due on the bills had been discharged in 1793, and the money paid to Donnithorne; that the co-trustees had made no inquiry about the trust fund from January, 1791, till May, 1795, which was the time when Symonds wrote the letter and made the applications already stated. On the hearing of the cause upon further directions, Lord Eldon said, "The cause comes back with a report stating a clear breach of trust in leaving the trust-fund in the situation represented from 1791 to 1793, and from 1793 to 1795. The money was laid out in 1791, with the consent of the trustees, on India bills *payable to Donnithorne*, a palpable breach of trust by placing the fund under his control, secured by little more than a promissory note payable to himself. It was probable that in 1793 Donnithorne would be paid the money due on the bills, and it would be lodged in his hands; and although the Court will proceed as favourably as it can to trustees who have laid out the money on a security from which they cannot with activity recover it, yet no Judge can say they are not guilty of a breach of trust, if they suffer it to lie out on such a security during so long a time (b). The trustees were guilty of a breach of trust, in permitting the money to remain on bills

(a) 3 Sw. 41.

(b) 3 Sw. 65.

payable to Donnithorne alone, and in leaving the state of the funds unascertained for five years (c). I agree with the Master of the Rolls that inquiry might, on the principles of this Court, have discharged the trustees in given circumstances from a breach of trust. If, without previous participation, they in June, 1795, had found that, being themselves implicated in no breach of trust, they had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts instead of filing a bill in this Court which perhaps might have destroyed his means of giving security, I should have hesitated long before I charged them, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee" (a). The result of his Lordship's judgment was, that under the circumstances disclosed by the Master's report, the trustees were to be held responsible for the loss of the money.

6. *Executor answerable for joining in receipts pro formâ.*—

Co-executors also, like co-trustees, are generally answerable each for his own acts only, and not for the acts of any co-executor (b).¹ But in respect of receipts, the case of *co-executors*

(c) 3 Sw. 67.

Eliz. 318; Anon. Dyer, 210 a; Wentw.

(a) 3 Sw. 71; see *Thompson v. Finch*, 22 Beav. 326.

Off. Ex. 306, 14 edit.; *Williams v. Nixon*, 2 Beav. 472.

(b) *Hargthorpe v. Milforth, Cro.*

¹ *Co-executors.*—Executors, like trustees, are as a rule liable for their own acts only; *McKim v. Aulbach*, 130 Mass. 481; *Sutherland v. Brush*, 7 Johns. Ch. 17; *Kerr v. Kirkpatrick*, 8 Ired. Eq. 137; *Kerr v. Water*, 19 Ga. 136; *White v. Bullock*, 20 Barb. 91; *Clarke v. Jenkins*, 3 Rich. Eq. 318.

If, however, an executor joins in giving a receipt he is liable, for he is not obliged to join for conformity, and has an individual authority in reference to the estate; *Monell v. Monell*, 5 Johns. Ch. 283; *Johnson v. Johnson*, 2 Hill, Eq. 290; *Sterrett's App.* 2 Pa. 219; *Monahan v. Gibbons*, 19 Johns. 427; likewise if he join in power of sale, though he receives none of the money; *Hauser v. Lehman*, 2 Ired. 594; *Deaderick v. Cantrell*, 10 Yerg. 263; *Ochiltree v. Wright*, 1 Dev. & B. Eq. 336; yet some cases try to put trustees and executors on the same footing in this respect; *McKim v. Aulbach*, 130 Mass. 481; *M'Nair's App.* 4 Rawle, 145; *Stell's App.* 10 Barr, 152. If an executor

is materially different from that of co-trustees. An executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator. If an executor join with a co-executor in a receipt, he does a wanton and unnecessary act; he interferes when the nature of the office lays upon him no such obligation, and therefore it was a rule very early established, that if executors joined in receipts, they should be answerable, each *in solido*, for the amount of the money received (c).

7. *Westley v. Clarke*. — In *Westley v. Clarke* (d), Lord Northington expressed an opinion that aimed at breaking down the rule; and by his decision of that case he succeeded in establishing a qualification of it.

(c) *Aplyn v. Brewer*, Pr. Ch. 173; *Murrell v. Cox*, 2 Vern. 560; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Leigh v. Barry*, 3 Atk. 584, *per eundem*; *Harrison v. Graham*, 3 Hill's MSS. 239, *per eundem*; cited 1 P. W. 241, 6th ed. note (y); *Darwell v. Darwell*, 2 Eq. Ca. Ab. 456; *Gregory v. Gregory*, 2 Y. & C. 316, *per* Baron Alderson.

(d) 1 Eden, 357; S. C. 1 Dick. 329; and see *Candler v. Tillett*, 22 Beav. 257; *Harden v. Parsons*, 1 Eden, 147,

148. Yet in *Churchill v. Hobson*, 1 P. W. 241, note (1) by Mr. Cox, his Lordship is reported to have said, according to a note of the case by Sir L. Kenyon, that in *Westley v. Clarke* he should have thought the co-executors liable if they had been present at the time the money was paid; and Lord Redesdale, in *Doyle v. Blake*, 2 Sch. & Lef. 242, 243, seemed to think that Lord Northington had no intention of breaking down, but only of qualifying the rule.

make it easy for a co-executor to misapply the funds of the estate he will be liable; *Adair v. Brimmer*, 74 N. Y. 539; *Edmonds v. Crenshaw*, 14 Pet. 166; *Sparhawk v. Buell*, 9 Vt. 41. An executor may become liable for his negligence and ignorance regarding estate funds; *Clark v. Clark*, 8 Paige, 152; also if he fail to require within a reasonable time payments due the estate by his co-executor; *Carter v. Cutting*, 5 Munf. 223. The liability of joint administrators is the same as that of co-trustees; *Murray v. Blatchford*, 1 Wend. 583; *O'Neill v. Herbert*, 1 McMul. Eq. 495. These rules are of much less importance in America than in England because here trustees, executors, administrators, etc., are required, unless there is a waiver by the proper parties, to give a bond for the faithful performance of their duties, and very often the bond required is a joint one, giving a remedy against all, for a breach by either, whether the misconduct was joint or only by one; *Ames v. Armstrong*, 106 Mass. 35; *Towne v. Ammidon*, 20 Pick. 535; *Hill v. Davis*, 4 Mass. 137; *Newcomb v. Williams*, 9 Met. 525; *Jeffries v. Lawson*, 39 Miss. 791; *Anderson v. Miller*, 6 J. J. Marsh. 568; *Braxton v. State*, 25 Ind. 82; *Babcock v. Hubbard*, 2 Conn. 539; but the estate of a deceased executor is not liable for any act of a co-executor after his death; *Brazer v. Clark*, 5 Pick. 96; *Towne v. Ammidon*, 20 Pick. 535. Where the bonds given are separate, there is the same absence of liability as first laid down; *McKim v. Aulbach*, 130 Mass. 481.

Thompson, one of three co-executors, had called in a sum of money secured by a mortgage for a term of years, and received the amount, and *afterwards*, but the same day, sent round his clerk to his co-executors with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. Thompson afterwards became bankrupt, and the money *was lost, and [*269] thereupon a bill was filed to charge the co-executors.

Lord Northington said, "The rule that executors joining in a receipt are all liable amounts to no more than this, that a joint receipt given by executors is a *stronger* proof that they *actually* joined in a receipt, because generally they have no occasion to join for conformity. But, if it appears plainly that one executor only received, and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason, and without being in a capacity to control the act of their co-executor either before or after the act was done, what grounds has any Court in conscience to charge him? The only act that affected the assets was the first that discharged the debt, and, according to the sense of the Bar, transferred the legal estate of the lands. Then *that* the co-executors are not to answer for, and the second is nugatory." His Lordship was therefore of opinion that the co-executors were not liable for the misapplication by the co-executor.

Executors joining pro forma not answerable where the joining was a nugatory act. — The doctrine propounded in this case, that the joint receipt of co-executors is merely a stronger proof of the actual receipt than in the instance of co-trustees, and that an executor as well as a trustee may rebut the presumption by positive evidence, has since been repeatedly controverted (*a*). The simple point determined, viz. that an executor who signs shall not be answerable when the act of signature is nugatory, may be considered as now settled.

(*a*) *Sadler v. Hobbs*, 2 B. C. C. & Lef. 341; *Chambers v. Minchin*, 7 114; *Scurfield v. Howes*, 3 B. C. C. Ves. 198; *Brice v. Stokes*, 11 Ves. 90; *Langford v. Gascoyne*, 11 Ves. 325; *Shipbrook v. Hinchinbrook*, 16 333; and see *Doyle v. Blake*, 2 Sch. Ves. 479; *Walker v. Symonds*, 3 Sw. & Lef. 243; *Joy v. Campbell*, 1 Sch. 64; *Re Fryer*, 3 Jur. N. S. 485.

Lord Thurlow, indeed, is reported to have questioned the decision in *Westley v. Clarke* (b); but Lord Alvanley said, "he must enter his dissent against the rule, that executors joining in a receipt were both liable, for he did not hold that an executor could not *in any case* be discharged from a receipt given for conformity: he did not find fault, for instance, with the case of *Westley v. Clarke*" (c). And, again, he said, "he perfectly concurred in the decision of that case; and the joining in a receipt, though not perhaps absolutely necessary, he would not consider *conclusive*" (d). Lord Eldon, in evident allusion to the case of *Westley v. Clarke*, admitted that the old rule had been *pared down*, at the same time expressing his opinion that the notion upon which the later cases had proceeded, viz. that the old [*270] rule had a tendency *to discourage executors from acting, was very ill founded. A plain general rule, he thought, which once laid down was easily understood and might be generally known, was much more inviting to executors than a rule referring everything to the particular circumstances (a).

Present doctrine on the subject. — The later doctrine of the Court was thus enunciated by Lord Eldon: — "Though one executor has joined in a receipt, yet whether he is liable shall depend upon his *acting*. The former was a simple rule that *joining* should be considered as *acting*, but now *joining alone* does not impose responsibility" (b); and in another case he observed that the old rule had been "broken down, leaving every case to be determined by its own circumstances" (c). Lord Redesdale laid down the rule thus: "the distinction with respect to mere signing appears to be this; that if a receipt be given for the purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control

(b) *Sadler v. Hobbs*, 2 B. C. C. 117. Ves. 198; *Brice v. Stokes*, 11 Ves.

(c) *Scurfield v. Howes*, 3 B. C. C. 325; *Walker v. Symonds*, 3 Sw. 64.

94. (b) *Walker v. Symonds*, 3 Sw. 64.

(d) *Hovey v. Blakeman*, 4 Ves. (c) *Shipbrook v. Hinchinbrook*, 16

608. Ves. 479.

(a) See *Chambers v. Minchin*, 7

of both, such receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors: if it was so considered by the person paying the money, then the joining in the receipt by the person who did not actually receive amounted to a direction to pay to his co-executor (for it could have no other meaning), and he became responsible for the money, just as if he had actually received it" (*d*). And in another case he said, "where two executors join in a receipt to a debtor, though the receipt of one would have been a discharge to the debtor, yet, they joining in the discharge, the debtor is taken to have paid to them both. His requiring the discharge of the executor who has not received the money amounts to saying, 'I make this payment to you both, and not to him only who actually receives the money'" (*e*).

8. *Churchill v. Hobson*.—In *Churchill v. Hobson* (*f*), Lord Harcourt took a distinction between creditors and legatees (*g*); that in the case of creditors who were entitled to the utmost benefit of the law, the joining of the executors in the receipt might make each liable for the whole; but when the legatees were concerned, who had no remedy for their *demand except in equity, it was altogether inequitable that one executor should answer for the receipt of the other. This doctrine was thus commented upon by Lord Northington. "At law," he said, "a joint receipt is conclusive evidence that the money came to them both, and is not to be contradicted; but a Court of equity, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact (*a*); and what is said by Lord Harcourt as to the distinction between a receipt of this kind as to a legatee and a creditor seems to have this meaning — that a *creditor* may at *law* charge both executors on a joint receipt, but that in a Court of *equity*, where alone *legacies* are received, such receipt shall not be

(*d*) *Joy v. Campbell*, 1 Sch. & Lef. 341.

(*e*) *Doyle v. Blake*, 2 Sch. & Lef. 242.

(*f*) 1 P. W. 241.

(*g*) See *Gibbs v. Herring*, Pr. Ch.

49.
(*a*) See *ante*, p. 201.

conclusive, but the Court will see who actually received, and charge that person accordingly" (*b*). The distinction taken by Lord Harcourt has by subsequent authorities been clearly overruled (*c*).

Executor may be answerable to creditors when not to legatees.—Lord Redesdale, however, has rightly observed, that "there *may* be a case, where executors would be charged as against creditors, though not as against legatees; for legatees are bound by the terms of the will, creditors are not, and therefore, if the testator direct the executors to collect the assets, and pay the proceeds into the hands of A., which is done accordingly, and A. fails, if a creditor remain unpaid, he may charge the executors; but, as regards a legatee, the executors may justify themselves by the directions of the will" (*d*).

9. Executor responsible for any act which puts assets into the hands of a co-executor.—On the same principle that an executor is liable for joining in a receipt, he is responsible for any act by which he reduces any part of the testator's property into the sole possession of his co-executor (*e*), as if an executor join in drawing (*f*), or indorsing (*g*), a bill, or be otherwise instrumental in giving to his co-executor possession of any part of the property (*h*). So it is laid down in an old case, that "if by agreement between the executors one be to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both" (*i*).

[*272] So an executor is answerable, if he give *a power of attorney, or other authority, to his co-executor

(*b*) *Harden v. Parsons*, 1 Eden, 147.

(*c*) See *Sadler v. Hobbs*, 2 B. C. C. 117; and see *Doyle v. Blake*, 2 Sch. & Lef. 239.

(*d*) *Doyle v. Blake*, 2 Sch. & Lef. 239, 245.

(*e*) *Townsend v. Barber*, 1 Dick. 356; *Moses v. Levi*, 3 Y. & C. 359; *Candler v. Tillett*, 22 Beav. 263, per M. R.

(*f*) *Sadler v. Hobbs*, 2 B. C. C. 114.

(*g*) *Hovey v. Blakeman*, 4 Ves. 608, per Lord Alvanley.

(*h*) *Clough v. Dixon*, 3 M. & Cr. 497, per Lord Cottenham; and see *Dines v. Scott*, T. & R. 361.

(*i*) *Gill v. Attorney-General*, Hard. 314; [*Lewis v. Nobbs*, 8 Ch. D. 591;] see *Moses v. Levi*, 3 Y. & C. 359.

to collect the assets (*a*), or deliver to him securities for money which enable him to receive the amount due (*b*).

10. **Executor not answerable for joining where the act is necessary.**— But under particular circumstances the joining of an executor is as absolutely necessary as the joining of a trustee, and of course in such cases executors and trustees are put upon the same footing in respect of liability.

As in bills of exchange held jointly.— Thus, if a bill of exchange be remitted to two agents payable to them personally, who on the death of their principal are made his executors, the mere indorsement of one, after they are executors, in order to enable the other to receive the money, will not operate to charge him who does not actually receive (*c*).

And in transfer of stock.— And so where the joining of both executors is necessary to the transfer of stock (*d*).

11. **Unless the act be with improper view.**— But where the joining of an executor is absolutely indispensable, it is still incumbent on the executor to see that the act in which he joins is perfectly consistent with the due execution of the trust (*e*).

12. **Executor must not depend on mere representation of his co-executor.**— And the executor will not be excused if he rely on the mere representation of his co-executor as to the necessity or propriety of the act, for the executor has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true (*f*).

13. **Greater caution required where the testator has been long dead.**— And if, at a period when in the ordinary course

(*a*) *Doyle v. Blake*, 2 Sch. & Lef. 231; *Lees v. Sanderson*, 4 Sim. 28; *Kilbee v. Sneyd*, 2 Moll. 200, per Sir A. Hart.

(*b*) *Candler v. Tillett*, 22 Beav. 236, per M. R.

(*c*) *Hovey v. Blakeman*, 4 Ves. 608, per Lord Alvanley.

(*d*) *Chambers v. Minchin*, 7 Ves. 197, per Lord Eldon; *Shipbrook v. Hinchinbrook*, 11 Ves. 254; S. C. 16 Ves. 479, per *eundem*; *Terrell v. Matthews*, 1 Mac. & G. 434, note; see *Murrell v. Cox*, 2 Vern. 570, and com-

pare *Scurfield v. Howes*, 3 B. C. C. 94; (Note, the doctrine at the period of the last case had not been settled); and see *Moses v. Levi*, 3 Y. & C. 359.

(*e*) *Chambers v. Minchin*, 7 Ves. 186; *Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Underwood v. Stevens*, 1 Mer. 712; *Bick v. Motley*, 2 M. & K. 312; *Williams v. Nixon*, 2 Beav. 472; *Hewett v. Foster*, 6 Beav. 259.

(*f*) *Shipbrook v. Hinchinbrook*, 11 Ves. 252, see 254; *Underwood v. Stevens*, 1 Mer. 712; *Hewett v. Foster*, 6 Beav. 259.

of administration the debts should long since have been discharged, an executor is applied to by his co-executor to join in a transfer of stock for the purpose of payment of debts, and the executor does inquire, and ascertains there are such debts, but afterwards it turns out that the co-executor had in his hands a fund sufficient for the payment of the debts, in such a case the executor who joins in the receipt is liable to the imputation of negligence for not having acquainted himself how the co-executor had dealt with the assets [*273] during the *preceding period, and is liable for the application of the money he enables the co-executor to receive (a).

14. **Executor must not leave the money in the hands of the co-executor.**—And the executor will be answerable if he leave the money, as for two years, in the hands of the co-executor, when by the terms of the trust it ought to have been invested on proper securities (b). But an executor will not be called upon to replace so much of the fund as it can be proved the co-executor *bond fide* expended towards the purposes of the trust (c).

15. **Liability of executor for not getting in money owing from a co-executor.**—And the executor will be equally answerable, whether the money left in the hands of the defaulting co-executor consists of a debt due from him to the testator, or of property received by him after the testator's death. Thus, in *Styles v. Guy* (d), a testator appointed three executors, all of whom approved the will; but one of them, viz., Guy, was the acting co-executor. Guy, at the death of the testator, had large assets in his hands, with which he eventually absconded. The two co-executors were held responsible for

(a) *Shipbrook v. Hinchinbrook*, 11 Ves. 254, per Lord Eldon; *Bick v. Motley*, 2 M. & K. 312.

(b) *Scurfield v. Howes*, 3 B. C. C. 91; *Styles v. Guy*, 1 Mac. & G. 422; 1 Hall & Tw. 523; *Egbert v. Butter*, 21 Beav. 560; *Williams v. Higgins*, W. N. 1868, p. 49; and see *Lincoln v. Wright*, 4 Beav. 427.

(c) *Shipbrook v. Hinchinbrook*, 11 Ves. 252; S. C. 16 Ves. 477; Wil-

liams v. Nixon, 2 Beav. 472; *Kilbee v. Sneyd*, 2 Moll. 213, per Sir A. Hart; *Underwood v. Stevens*, 1 Mer. 712; and see *Brice v. Stokes*, 11 Ves. 328; *Hewett v. Foster*, 6 Beav. 259.

(d) 1 Mac. & G. 422; 1 Hall & Tw. 523; *Egbert v. Butter*, 21 Beav. 560; and see *Scully v. Delany*, 2 Ir. Eq. Rep. 165; *Candler v. Tillet*, 22 Beav. 257.

the loss; and though free from blame morally, had to pay upwards of 20,000*l.* out of their own pockets. They knew, or ought to have known, that Guy was a debtor to the estate; and having by probate accepted the executorship, it was their duty to have recovered the debt from Guy as from any other debtor to the estate, and this they neglected to do for a period of six years.

16. **Co-administrators on same footing as co-executors.** — The rules respecting co-executors are equally applicable to co-administrators. Lord Hardwicke once expressed an opinion that joint administrators resembled rather co-trustees, and that any one of them could not exercise the office without the concurrence of the rest (*e*); but it was afterwards determined in the Court of King's Bench, that joint administrators and co-executors stood in this respect precisely on the same footing (*f*).

17. **How trustee ought to act where a breach of trust is committed by a co-trustee.** — To return to the liabilities of co-trustees: if one trustee be cognizant of a breach of trust committed by another, and either industriously conceal it (*g*), or do not take active measures for the *pro- [*274] tection of the *cestui que trust's* interest (*a*), he will himself become responsible for the mischievous consequences of the act. A trustee is called upon, if a breach of trust be *threatened*, to prevent it by obtaining an injunction (*b*), and, if a breach of trust has been *already committed*, to bring an action for the restoration of the trust fund to its proper condition (*c*), or, at least, to take such other active measures as, with a due regard to all the circumstances of the case may be considered the most prudential (*d*).

(*e*) *Hudson v. Hudson*, 1 Atk. 460.

(*f*) *Willand v. Fenn*, cited *Jacomb v. Harwood*, 2 Ves. 267.

(*g*) *Boardman v. Mosman*, 1 B. C. C. 68.

(*a*) *Brice v. Stokes*, 11 Ves. 319; and see *Walker v. Symonds*, 3 Sw. 41; *Oliver v. Court*, 8 Price, 166; *In re Chertsey Market*, 6 Price, 279; *Attorney-General v. Holland*, 2 Y. & C. 609; *Booth v. Booth*, 1 Beav. 125; 71.

Williams v. Nixon, 2 Beav. 472; *Blackwood v. Burrowes*, 2 Conn. & Laws. 477; *Gough v. Smith*, W. N. 1872, p. 18.

(*b*) *In re Chertsey Market*, 6 Price, 279.

(*c*) *Franco v. Franco*, 3 Ves. 75; *Earl Powlet v. Herbert*, 1 Ves. jun. 297.

(*d*) See *Walker v. Symonds*, 3 Sw.

18. **Effect of the indemnity clauses.** — [Formerly an express clause was] inserted in trust-deeds, that one trustee should not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informed the trustee of the general doctrine of the Court, added nothing to his security against the liabilities of the office. In *Westley v. Clarke* (*e*) Lord Northington was inclined to attach some importance to the clause. But equity infuses such a proviso into every trust-deed (*f*), and a person can have no better right from the expression of that which, if not expressed, had been virtually implied (*g*). It is clear that, in later cases, the Court has considered it an immaterial circumstance whether the instrument creating the trust contained such a proviso or not (*h*). And now, by Lord St. Leonards' Act, every instrument creating a trust shall be deemed to contain the usual indemnity and re-imbursement clauses, and therefore in future the express introduction of them in deeds and wills may be safely dispensed with (*i*).

19. **Special indemnity clause.** — A settlor, however, has full power to abridge the ordinary duties of trustees, and a *special* indemnity clause may be so worded as to exempt trustees from responsibility in respect of acts, which would otherwise be breaches of trust. Thus, if a testator declare "that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive [*275] any moneys, * shall not be obliged to see to the application thereof; nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys," here the testator has not only appointed joint trustees, but has also authorized each of them to delegate his duties to a co-trustee;

(*e*) 1 Eden, 360.

(*f*) See *Dawson v. Clarke*, 18 Ves. 254.

(*g*) *Worrall v. Harford*, 8 Ves. 8.

(*h*) *Brice v. Stokes*, 11 Ves. 319; *Bone v. Cook*, M'Clel. 168; S. C. 13 Price, 332; *Hanbury v. Kirkland*, 3 Sim. 265; *Moyle v. Moyle*, 2 R. & M. 710; *Sadler v. Hobbs*, 2 B. C. C. 114;

Mucklow v. Fuller, Jac. 198; *Pride v. Fooks*, 2 Beav. 430; *Williams v. Nixon*, 2 Beav. 472; *Fenwick v. Greenwell*, 10 Beav. 418; *Drosier v. Brereton*, 15 Beav. 221; *Dix v. Burford*, 19 Beav. 409; *Brumridge v. Brumridge*, 27 Beav. 5; *Rehden v. Wesley*, 29 Beav. 213.

(*i*) 22 & 23 Vict. c. 35, s. 31.

and therefore where two trustees, under such a power, enabled a third to receive moneys, who misapplied them, and the fraud was concealed for two years, the two were held not to be responsible, though but for the special power they would have been declared liable on the ground of *crassa negligentia* (a); [and this case has since been followed (b).]

Sixthly. A Trustee shall not make a *profit* of his office.¹

1. *Trustees shall derive no advantage from the trust.* — It is a general rule established to keep trustees in the straight line of their duty, that they shall not derive any personal advantage from the administration of the trust property (c).

(a) *Wilkins v. Hogg*, 3 Giff. 116; 10 W. R. 47.

[(b) *Pass v. Dundas*, 43 L. T. N. S. 665; 29 W. R. 332.]

(c) *Burgess v. Wheate*, 1 Eden, 226, *per* Lord Mansfield; *Ib.* 251, *per* Lord Henley; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 126, *per* Lord Redesdale; *Ex parte Andrews*, 2 Rose, 412, *per* Sir T. Plumer; *Middleton v. Spicer*, 1 B. C. C. 205, *per* Lord Thurlow; *Docker v. Somes*, 2 M. & K.

664, *per* Lord Brougham; *Gubbins v. Creed*, 2 Sch. & Lef. 218, *per* Lord Redesdale; and see *Hamilton v. Wright*, 9 Cl. & Fin. 111; *Bentley v. Craven*, 18 Beav. 75; [*Bennett v. Gaslight and Coke Company*, 52 L. J. N. S. Ch. 98.] A legacy therefore to a person as a mere trustee for others, is not invalidated by the fact of such trustee or his wife being an attesting witness to the will. *Cresswell v. Cresswell*, 6 L. R. Eq. 69.

¹ *Profits of the trust.* — Trustees are appointed for the purpose of managing the trust property, and trusts are created for the benefit of children, women, persons for some reason incapacitated, or for those whom a testator may think unsuited to take proper care of property. It naturally follows that a trustee should take no advantage of his position to receive personal gain from the trust property, his duty being to protect it, and that, too, without having an adverse interest. *Parshall's App.* 65 Pa. St. 233; *Sloo v. Law*, 3 Blatchf. C. C. 459. A person holding any fiduciary relation to an estate cannot buy up debts against, or incumbrances upon it, at a discount without accounting for the full benefit derived to the estate or the party, having the beneficial interest therein; *King v. Cushman*, 41 Ill. 31; *Slade v. Van Vechten*, 11 Paige, 21; *Schoonaker v. Van Wyck*, 31 Barb. 457; *Barksdale v. Finney*, 14 Gratt. 338. And it has been held that the trustee may not receive a gift nor make a purchase from his *cestui que trust*; *Green v. Winter*, 1 Johns. Ch. 26; *Andrews v. Hobson*, 23 Ala. 219; *Mason v. Martin*, 4 Md. 124; *Baxter v. Costin*, 1 Busb. Eq. 262; but if the trustee, who has the burden of proof, shows that such gift or purchase was entirely fair and above suspicion, it may stand; *Harrington v. Brown*, 5 Pick. 519; *Lyon v. Lyon*, 8 Ired. Eq. 201; *Smith v. Isaac*, 12 Mo. 106; *Stuart v. Kissam*, 2 Barb. 493; yet the *cestui trust* may have such a sale set aside; *Smith v. Lansing*, 22 N. Y. 530; *Evertson v. Tappen*, 5 Johns. Ch. 497; *Wiswall v. Stewart*, 32 Ala. 438; *Iddings v. Bruen*, 4 Sandf. Ch. 222; *Patton v. Thompson*, 2 Jones Eq. 285; *Bellamy v. Bellamy*, 6 Fla. 62. See notes *ante* on resulting and constructive trust and

Not entitled to the game on the trust estate where it can be let.—It was upon this principle that Lord Eldon once directed an inquiry, whether the liberty of *sporting* over the trust estate could be let for the benefit of the *cestuis que trust*, and, if not, he thought the game should belong to the heir; the trustee might appoint a gamekeeper, if necessary, for the preservation of the game, but not to keep up a mere establishment of pleasure (*d*).

2. Nor to a right of presentation.—So, if an *advowson* be devised to trustees, and the next presentation cannot be made productive to the trust estate, the right of presentation does not belong to the trustee, but must be exercised by him for the benefit of the heir-at-law, or of the *cestuis que trust*, according to circumstances. Thus, where an *advowson* was devised to trustees upon trust during the life of A., to apply the rents and profits in the purchase of an estate to be settled to certain uses upon the death of A., it was decided that the right of presentation (should any vacancy occur) during

A.'s life, would, as undisposed of, belong to the heir-
[*276] at-law (*e*); and, in a later case, * where there was a devise to trustees during the life of A. to apply the rents and profits in *payment of debts*, it was held that the right of next presentation during the life of A. was a profit, and ought to be sold for the benefit of the creditors (*a*). If a testator devise an *advowson* to trustees for *sale*, the proceeds to be divided amongst certain persons, and a presentation falls, though the heir is absolutely disinherited, the trustees have not the nomination, but it belongs to the *cestuis*

(*d*) Webb v. Earl of Shaftesbury, 7 Ves. 480, see 488; and see Hutchinson v. Morritt, 3 Y. & C. 547.

Sim. 579; Gubbins v. Creed, 2 Sch. & Lef. 218; Re Shrewsbury School, 1 M. & Cr. 647.

(*e*) Sherrard v. Harborough, Amb. 165; and see Martin v. Martin, 12

(*a*) Cooke v. Cholmondeley, 3 Drew. 1.

post as to trustee purchasing. The trustee is liable for the losses, and can receive none of the profits if he uses the trust fund in trade or speculation, so that his temptation to risk trust funds is reduced to a minimum; Penman v. Slocum, 41 N. Y. 53; Durling v. Hammar, 5 C. E. Green, 220; Brown v. Rickets, 4 Johns. Ch. 303; and he must render a true account of all gains; Van Epps v. Van Epps, 9 Paige, 237; Richardson v. Spencer, 18 B. Mon. 450; the same rule holds true as between parties; Jones v. Dexter, 130 Mass. 380.

que trust (b), and where the *cestuis que trust* are tenants in common, they must cast lots for the presentation (c).

3. **Trustee may not buy up debts for himself.** — If trustees or executors buy up any debt or incumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors or legatees, or other *cestuis que trust*, shall have the advantage of it (d). [And if a trustee takes advantage of his position to buy up fixtures on the trust property, which he afterwards sells at a profit, he cannot personally retain the benefit so acquired (e); and the same principle applies to all persons in a fiduciary position, as in the case of a solicitor buying up incumbrances created by his client, for the purpose of relieving the client from embarrassment (f).] But if a trustee buy up a debt intending it for the *cestuis que trust*, and they refuse to take it or pay the purchase-money, they cannot, after lying by for a length of time, step forward when the speculation turns out profitably and claim the debt for themselves (g).

4. **Trustee trading with the trust estate must account for the profits.** — Again, if a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust money in a commercial adventure, as in fitting out a vessel for a voyage; or put it into the trade of another person from which he is to derive certain stipulated gains (h), or employ *it [*277] himself for the purposes of his own business or

(b) *Hawkins v. Chappel*, 1 Atk. 621; *Johnstone v. Baber*, 22 Beav. 562; *Briggs v. Sharp*, 20 L. R. Eq. 317.

(c) *Johnstone v. Baber*, 22 Beav. 562; reversed on this point on appeal, 6 De G. M. & G. 439.

(d) *Robinson v. Pett*, 3 P. W. 251, note (A); *Darcy v. Hall*, 1 Vern. 49; *Ex parte Lacey*, 6 Ves. 628, per Lord Eldon; *Morret v. Paske*, 2 Atk. 54, per Lord Hardwicke; *Anon.* 1 Salk. 155; *Carter v. Horne*, 1 Eq. Ca. Ab. 7; *Dunch v. Kent*, 1 Vern. 260; *Fosbrooke v. Balguy*, 1 M. & K. 226;

Pooley v. Quilter, 4 Drew. 184; 2 De G. & J. 327.

[(e) *Armstrong v. Armstrong*, 7 L. R. Ir. 207.]

[(f) *Macleod v. Jones*, 24 Ch. D. 289; but in such a case the solicitor will be allowed interest at the rate of 5l. per cent. on the money employed by him in buying up the incumbrances. S. C. 50 L. T. N. S. 358; 32 W. R. 660.]

(g) *Barwell v. Barwell*, 34 Beav. 371.

(h) *Docker v. Somes*, 2 M. & K. 664, per Lord Brougham.

trade(a), in all these cases, while the executor or trustee is liable for all losses, he must account to the *cestui que trust* for all clear profits. And where a trustee retired from his trust in consideration of his successor paying him a sum of money, it was held that the money so paid must be treated as forming part of the trust estate, and be accounted for by the retiring trustee (b).

5. **Giving to a trustee.** — Neither can a trustee bargain with his *cestui que trust* for a benefit, and it is even said that a *cestui que trust* cannot give a benefit to his trustees (c).

6. **Mortgagee regarded as a trustee to some intents.** — *Mortgagees* are to some, though not to all, intents and purposes trustees, and in one case (the authority of which, however, has been doubted), where a mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's right of dower, it was decreed that the heir of the mortgagor, on bringing his bill to redeem, might take the purchase at the price paid (d).

7. **Partners.** — *Partners* also stand in a fiduciary relation to each other (e), and if on the termination of the partnership by effluxion of time (f), or bankruptcy (g), or death (h), a partner instead of winding up the partnership affairs, retains the whole assets in the trade, so that in effect the

(a) *Docker v. Somes*, 2 M. & K. 656; *Willett v. Blanford*, 1 Hare, 253; *Cummins v. Cummins*, 8 Ir. Eq. Rep. 723; *Parker v. Bloxam*, 20 Beav. 295; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84; *Townend v. Townend*, 1 Giff. 201; [*Flockton v. Bunning*, 8 L. R. Ch. App. 323, n.] If the trustee or executor be one only of a firm, he must account for his share of the profits. *Vyse v. Foster*, 8 L. R. Ch. App. 309; affirmed 7 L. R. H. L. 318; *Jones v. Foxall*, 15 Beav. 388.

(b) *Sugden v. Crossland*, 3 Sm. & G. 192.

(c) *Vaughton v. Noble*, 30 Beav. 34; see 39.

(d) *Baldwin v. Banister*, cited *Robinson v. Pett*, 3 P. W. 251, note (A);

and see comments thereon, *Dobson v. Land*, 8 Hare, 220; and compare *Arnold v. Garner*, 2 Ph. 231; *Matthierson v. Clarke*, 3 Drew. 3.

(e) *Bentley v. Craven*, 18 Beav. 75; *Parsons v. Hayward*, 31 Beav. 199.

(f) See Lord Eldon's observations, *Crawshay v. Collins*, 15 Ves. 226.

(g) *Crawshay v. Collins*, 15 Ves. 218.

(h) *Brown v. De Tastet*, Jac. 284; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84; [*The Lord Provost, &c., of Edinburgh v. The Lord Advocate*, 4 App. Cas. 823;] and see *Flockton v. Bunning*, 8 L. R. Ch. App. 323, n.

partnership continues, he must account for a share of the profits (i). But as profits arise not only from *capital*, but also from * the application of skill and industry, and other ingredients (a), while in former times the Court, from the difficulty of taking the account, often gave interest only (b); yet, at the present day, the Court will direct an account of profits, *having regard* to the various ingredients of capital, skill, industry, &c., or will comprise them under the head of "*just allowances*" (c).

8. **Traders not partners.**—Where the trader stands in no fiduciary situation, as where he is neither trustee nor executor, nor was the partner of the testator, but trust monies come to his hands *bond fide*, though with a knowledge of the trust, that is, of the breach of trust (as where a trustee or executor lends money without authority to a trader), here the trader, though answerable for principal and interest, is not made to account for the extra profits (d). And if a person was in fact a partner with the testator but without knowing it (e), or has *bond fide* settled the partnership accounts (f), he will be equally protected as if he had not been such partner. And if the terms of the partnership be that on the death of any partner his share shall be taken by

(i) In *Knox v. Gye*, 5 L. R. H. L. 666, Lord Westbury denied that any fiduciary relation existed between the surviving partner, and the representative of the deceased partner, but Lord Hatherley was clearly of opinion to the contrary. See the arguments of these judges *pro* and *con* in the report. The surviving partner has, no doubt, larger powers than an ordinary trustee, for as between him and third persons he can sign a valid receipt for an outstanding asset, and being personally liable for the debts, he may be able to give a good title on sale of the partnership property, the presumption being that such realization is wanted for payment of debts; but it seems a strong measure to lay down, that the surviving partner is not to account for what he receives after the expiration of six

years from the death of his co-partner.

(a) See *Vyse v. Foster*, 8 L. R. Ch. App. 331; affirmed, 7 L. R. H. L. 318.

(b) See the observations in *Docker v. Somes*, 2 M. & K. 662.

(c) *Brown v. De Tastet*, Jac. 284; *Willett v. Blanford*, 1 Hare, 253.

(d) *Stroud v. Gwyer*, 28 Beav. 130; *Townend v. Townend*, 1 Giff. 210; *Simpson v. Chapman*, 4 De G. M. & G. 154; *Macdonald v. Richardson*, 1 Giff. 81. See *Flockton v. Bunning*, 8 L. R. Ch. App. 323, note (6).

(e) *Brown v. De Tastet*, Jac. 284.

(f) *Chambers v. Howell*, 11 Beav. 6. And in *Ex parte Watson*, 2 Ves. & B. 414, Lord Eldon seems to speak of *partners* taking with notice, as *debtors* for the money, as if it had been placed with them by way of direct loan.

the survivor, at the value estimated at the last stocktaking, and a partner dies having appointed three executors, one of whom is a co-partner, and another afterwards becomes a co-partner, and the testator's share is left in the business and traded with, the two executors who are in the firm are not answerable for profits, but only for the capital of the testator's share with interest. The surviving partners are in this case regarded as purchasers of the share of the deceased, at the price expressed by the articles, and the two executors are answerable on the footing only of having left outstanding a debt, which they ought in a reasonable time to have got in (g).

[*279] *9. *Agents, &c.* — The foregoing principle that trustees are not to profit by the trust applies to *agents* (a), *guardians* (b), (who are trustees to the extent of the property come to their hands (c)), *directors* of a company (d), secretary of a company (e), [promoters of a company (f),] *inspectors* under creditor deeds (g), the *mayor* of

(g) *Vyse v. Foster*, 8 L. R. Ch. App. 309; affirmed, 7 L. R. H. L. 318. The judgment of L. J. James should be read, to see the principles upon which the Court now acts. The Court in this case viewed the claim against the surviving parties, though one of them was also executor, as a debt only, and, as such, not giving a right to an account of profits, and the Court observed that, although there had been hundreds, probably thousands, of cases in which traders had been executors, and in which, on taking the accounts, balances, and large balances, had been found due from them, yet where there had been *no active breach of trust*, in the getting in or selling out trust assets, but there had been a mere balance on the account of receipts and payments, the omission to invest the balance had never made the executor liable to account for the profits of his own trade. *Ib.* p. 335.

(a) *Morret v. Paske*, 2 Atk. 54, *per* Lord Hardwicke.

(b) *Powell v. Glover*, 3 P. W. 251, note.

(c) *Sleeman v. Wilson*, 13 L. R. Eq. 41, *per Cur.*

(d) *Great Luxembourg Railway Company v. Magnay*, 25 Beav. 586; *Imperial Mercantile Credit Association v. Coleman*, 6 L. R. Ch. App. 558; 6 L. R. H. L. 189; *Parker v. McKenna*, 10 L. R. Ch. App. 96; *In re Imperial Land Company of Marseilles Ex parte Larking*, 4 Ch. D. 566; [*Nant-y-glo and Blaina Ironworks Company v. Grave*, 12 Ch. D. 738.]

(e) *In re McKay's case*, 2 Ch. D. 1.

[(f) *New Sombbrero Phosphate Company v. Erlanger*, 5 Ch. D. 73; *Bagnall v. Carleton*, 6 Ch. D. 371; *Emma Silver Mining Company v. Grant*, 11 Ch. D. 918; *Emma Silver Mining Company v. Lewis*, 4 C. P. D. 396.]

(g) *Chaplin v. Young*, (No. 2), 33 Beav. 414.

a corporation (*h*), and generally to all persons clothed with a fiduciary character (*i*).

10. **Heir or devisee purchasing incumbrance.** — Even an *heir* has been so far regarded as a trustee for *creditors of the ancestor*, that he cannot hold an incumbrance as against them for more than he gave for it (*j*), and it is presumed, though there is no decision upon it, that the rule applies equally to a devisee as between him and the creditors of the testator (*k*).

But either an heir or a devisee who was himself an incumbrancer at the death of the ancestor or testator, may buy up a prior (but not a subsequent) incumbrance, and hold it for the whole amount due; for his own incumbrance is by title paramount and not affected by any trust for creditors, and the Court considers him to that extent as a stranger, and allows him to buy up the prior incumbrance not as heir or devisee, but for the protection of his own incumbrance (*l*). And if the heir or devisee acquire the prior incumbrance *not by his own act or procurement* but by the *bounty of another*, as either by gift *inter vivos*, or by will, there seems no reason on principle why the heir or devisee should not hold the prior incumbrance for the whole amount due; and *semble* it can make no difference whether the donor was the prior incumbrancer himself, or was a stranger who had purchased from the incumbrancer at an under-value (*m*).

* And an heir or devisee may, it seems, hold an [*280] incumbrance which he has bought up himself at an under-value for the whole amount as against a subsequent incumbrancer, though not as against the general creditors of the ancestor or testator; as if A. be the first incumbrancer, B. the second, and C. the heir or devisee, and C. buys up A.'s incumbrance, here if B. have a charge merely and is not a creditor, or his debt is barred by the statute, there is no

(*h*) *Bowes v. City of Toronto*, 11 Moore, P. C. C. 468.

(*i*) *Docker v. Somes*, 2 M. & K. 665.

(*j*) *Lancaster v. Evors*, 10 Beav. 154; and see 1 Ph. 354; *Brathwaite v. Brathwaite*, 1 Vern. 334; *Long v.*

Clopton, 1 Vern. 464; *Darcy v. Hall*, 1 Vern. 49; *Morret v. Paske*, 2 Atk. 54.

(*k*) See *Long v. Clopton*, 1 Vern. 464; *Davis v. Barrett*, 14 Beav. 542.

(*l*) *Davis v. Barrett*, 14 Beav. 542; *Darcy v. Hall*, 1 Vern. 49.

(*m*) See *Anon.* 1 Salk. 155.

thread of trust or confidence running between B. and C., and therefore C. is regarded as a stranger (*a*).

11. *Joint purchasers*. — One of two *joint purchasers* of an estate has been declared a trustee for the other of a proportionate part of the benefit derived by the former from an incumbrance bought up by him at a less value (*b*).

12. *Tenant for life*. — An opinion has also been expressed by a high authority, that even a *tenant for life* stands in such a confidential relation towards the remainderman that he cannot as against him hold an incumbrance which he has bought up for more than he gave for it (*c*).

13. *Trustee may not charge for services*. — As regards trustees, in the strict sense of the word, the general rule deprives them of any right to receive remuneration for their personal labour and services.¹

(*a*) *Davis v. Barrett*, 14 Beav. 542. The observations of M. R. are general, but he probably meant no more than this. (*b*) *Carter v. Horne*, 1 Eq. Ca. Ab. 7. (*c*) *Hill v. Browne*, Drur. 433.

¹ *Compensation of trustees*. — In most of the United States trustees are entitled to a reasonable compensation, but not to any collateral profit, as by an appointment as a receiver, or services as broker, agent, banker, attorney, or auctioneer, although they may hire such services, if needed, at the expense of the estate. *Binsse v. Paige*, 1 Keyes, 87; *Morgan v. Hannas*, 49 N. Y. 667; *Jenkins v. Fickling*, 4 Des. 360; *Mayer v. Galluchat*, 6 Rich. Eq. 2. If the trust states the compensation it cannot be increased; *College v. Willingham*, 13 Rich. Eq. 195; *Biscoe v. State*, 23 Ark. 592; likewise if amount has been agreed on; *Jackson v. Jackson*, 3 N. J. Eq. 113. In case of the death of the *cestui que trust*, see *Parker v. Ames*, 121 Mass. 220; of trustee, see *Widener v. Fay*, 51 Md. 273; *Savage v. Sherman*, 24 Hun, 307. Compensation to an unfaithful and negligent trustee may be properly refused; *Gordon v. Matthews*, 30 Md. 235; *Hermstead's App.* 60 Pa. St. 423; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Norris's App.* 71 Pa. St. 106; *Warbass v. Armstrong*, 10 N. J. Eq. 263; *Stearly's App.* 38 Pa. St. 525; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Cook v. Lowry*, 95 N. Y. 103; *Nagle's Est.* 12 Phila. 25; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495. Compensation may be received for services both as executor and as trustee; *Laytin v. Davidson*, 95 N. Y. 263; *Phoenix v. Livingston*, 101 N. Y. 451; *Pitney v. Everson*, 42 N. J. Eq. 361; *Hall v. Campbell*, 1 Dema. (N. Y.) 415; unless the compensation is fixed by will; *Brownson v. Roberts*, 5 Redf. 576. In New York where the statute of 1863 made special provision where the value of the estate exceeds \$100,000 the income cannot be added to increase the amount; *Meeker v. Crawford*, 5 Redf. 450; *Slosson v. Naylor*, 2 Dema. 257. In addition to the commission on the principal, the trustee is entitled to a yearly commission on the income in accordance with his accounting; *Hancox v. Meeker*, 95 N. Y. 528; *Re Meserole*, 36 Hun, 298; *Frame v. Willets*, 4 Dema. 368; but see *Brush v. Smith*, 1

14. Trustee may not be receiver of the trust estate at a salary.—Thus, the trustee of an estate cannot be appointed

Dema. 477. After estate is settled and balance remains in his hands, an annual account being rendered, the trustee may retain a commission on the income; *Re Mason*, 98 N. Y. 527. The compensation is based on the real value of the estate, not on the value of the life interest; *Phoenix v. Phoenix*, 28 Hun, 629; trustee is not estopped by delay from claiming his commission; *Wister's App.* 86 Pa. St. 160. No commission will be allowed on fund received from predecessor unless litigation was necessary to obtain it, then legitimate expenses will be allowed; *Jenkins v. Whyte*, 62 Md. 427; where goods were consigned to a house of which one of the trustees was a member, a commission was allowed, and the rule allowing the trustee no profit from the estate was held inapplicable; *Turnbull v. Pomeroy*, 140 Mass. 117. Surrogate may allow commissions, one-half for receipts and one-half for payments; *Re Roosevelt*, 5 Redf. 601. Payments by the trustee to the *cestui que trust* are not "disbursements" within the meaning of a decree of court allowing commissions on disbursements; *Whyte v. Dimmock*, 55 Md. 452; the services and expenditures of the trustee must be within the line of the duties required of him by the declaration of trust; *Tracy v. Gravois* R. R. Co. 84 Mo. 210. Compensation and expenses allowed on compromise settlement of suit; *Lanier v. Brunson*, 21 S. C. 41; but not if it is a suit which the trustee should have avoided; *Page v. Boynton*, 63 N. H. 190; also allowed during the pendency of a bill of interpleader; *Daniel v. Fain*, 5 Lea (Tenn.) 258. A lawyer, who is a trustee, may be allowed compensation for his professional services; *Perkins's App.* 108 Pa. St. 314; 56 Am. Rep. 208; and an attorney engaged by a trustee to defend an illegal suit is entitled to compensation though the trustee is a defaulter and absconds without paying him; *Manderson's App.* 113 Pa. St. 631. A trustee will not be discharged for receiving small sums as presents; *Jacobus v. Munn*, 37 N. J. Eq. 48. If a trustee is allowed a double or triple commission on the principal, he will receive the same on the income; *Waters v. Faber*, 2 Dema. 290; where a certain sum was allowed in lieu of commissions it covered everything; *Brownson v. Roberts*, 5 Redf. 576. An administrator with the will annexed and trustee, whose letters were revoked, entitled to no compensation; *Re Baker*, 35 Hun, 272. If a trustee resigns for his own convenience, he is entitled to a commission on income only. *Re Allen*, 29 Hun, 7. Trustee waives commissions to a certain date, but that does not prejudice his claim to them since that time; *Denmead v. Denmead*, 62 Md. 321; if trustee makes gift of services he can have no compensation; *Vestry v. Barksdale*, 1 Strob. Eq. 197; *Haglar v. McCombs*, 66 N. C. 345; nor does he necessarily forfeit his commissions by his irregularities provided they have worked no harm; *Morgan v. Morgan*, 4 Dema. 353. Commissions may be fixed by agreement with the *cestui que trust*; *Bowker v. Pierce*, 130 Mass. 262. For time of payment of commissions, see *Myers v. Fenn*, 5 Wall. 205; *Burckmyer v. Beach*, 7 Rich. Eq. 487. If a trustee fails to keep proper accounts and make proper returns, no compensation will be given him; *Marcy's Acc't*, 24 N. J. Eq. 451; *Kenan v. Hall*, 8 Ga. 417; but this is far from universal; *Wistar's App.* 54 Pa. St. 60; *Gee v. Hicks*, Rich. Eq. Cas. 5; *Kee v. Kee*, 2 Gratt. 116; *Myers' App.* 62 Pa. St. 104; *Parker's Est.* 64 Pa. St. 307.

For the amount of compensation, and the method of determining it, see the statutes of the various states. Delaware, Ohio, and Illinois appear to be quite exceptional, in disallowing compensation to the trustee.

receiver of it at a salary (*d*); and even should he offer his services gratuitously, he would not be appointed except

(*d*) *Sutton v. Jones*, 15 Ves. 584; 515; and see *Morison v. Morison*, 4 Sykes v. Hastings, 11 Ves. 363; — *M. & Cr.* 215.
v. Jolland, 8 Ves. 72; *Anon.* 3 Ves.

In New York the compensation fixed by statute is five per cent on \$1000, two and a half per cent on the next \$9000, and one per cent on the balance, to executors, &c., and the same amount is allowed trustees; *Livingston's Case*, 9 Paige, 442; *Re Schmidt*, 3 Dema. 245; *Re Schell*, 53 N. Y. 263; *Greer v. Greer*, 5 Redf. 214; also their reasonable expenses; *Dakin v. Demming*, 6 Paige, 95; compensation is reckoned on all the estate; *De Peyster's Case*, 4 Sandf. 514. If a trust deed grants an extra compensation it will not be allowed; *Griffin v. Barney*, 2 Comst. 372; *Nichols v. McEwen*, 21 Barb. 66. A gross sum or a charge by the day will not be allowed; *Valentine v. Valentine*, 2 Barb. Ch. 430, but see *Jewett v. Woodward*, 1 Edw. Ch. 199; the compensation is not a matter of discretion; *Morgan v. Hannas*, 49 N. Y. 667; *Meacham v. Sternes*, 9 Paige, 405; double commissions will not be allowed in case of a change of trustees; *Hosack v. Rogers*, 9 Paige, 468; *White v. Bullock*, 20 Barb. 99; *Jones's Case*, 4 Sandf. Ch. 616.

In Massachusetts, trustees are allowed such compensation as the court orders and their expenses. Five per cent on the whole amount has been allowed; *Barrell v. Joy*, 16 Mass. 229; *Longley v. Hall*, 11 Pick. 124; *Ellis v. Ellis*, 12 Pick. 183; *Urann v. Coates*, 117 Mass. 41; they will vary with the circumstances of the case; *Blake v. Pegram*, 101 Mass. 592; *Dixon v. Homer*, 2 Met. 422; *Scudder v. Crocker*, 1 Cush. 382; and an agreement with the *c'estui que trust* may be ratified; *Bowker v. Pierce*, 130 Mass. 262; commissions for change of investments must be paid out of the income; *Heard v. Eldredge*, 109 Mass. 258.

In Maine there is an allowance of a dollar a day, a dollar for each ten miles of travel and a commission to be fixed by the court not to exceed five per cent, according to services rendered.

In New Hampshire the commission varies from two to five per cent, which the court allows in addition to travel and attendance; *Tuttle v. Robinson*, 33 N. H. 118; *Wendell v. French*, 19 N. H. 205.

In Connecticut the court exercises its discretion; *Clark v. Platt*, 30 Conn. 282; *Cantfield v. Bostwick*, 21 Conn. 555.

In Vermont there is a statute provision, and an additional allowance is sometimes made; *Hubbard v. Fisher*, 25 Vt. 542; *Evarts v. Nason*, 11 Vt. 122.

In Pennsylvania it is in the discretion of court; *Carrier's App.* 79 Pa. St. 280; *Norris's App.* 71 Pa. St. 107; *Hermstead's App.* 60 Pa. St. 423; a mistake of judgment will not forfeit commissions; *Meyers's App.* 62 Pa. St. 109. Five per cent is the usual allowance; *Wood's App.* 86 Pa. St. 346; *Pennell's App.* 2 Barr. 216. Double commission are never allowed; *Aston's Est.* 5 Whart. 228. Nor any on reinvestments; *Hemphill's App.* 6 Harris, 303; extral and legal services may be paid for; *Lowrie's App.* 1 Grant. Cas. 373; but not if made necessary through trustee's fault; *Stearly's App.* 38 Pa. St. 525; a commission on the income only of investments is allowed; *McCauseland's App.* 38 Pa. St. 466; the amount allowed is for services rendered and not by way of a percentage; *Montgomery's App.* 86 Pa. St. 230; *Wood's*

under particular circumstances, for it is the duty of the trustee to superintend the receiver and check the accounts

App. 86 Pa. St. 346; Harper's App. 111 Pa. St. 243; two and one-half per cent has been allowed for selling land, and three per cent for extra services; Carrier's App. 79 Pa. St. 230; Snyder's App. 54 Pa. St. 69.

In New Jersey, by statute in addition to expenses the commission shall not exceed seven per cent on first \$1000, four per cent on next \$4000, three per cent on next \$5000, and two per cent on all above \$10,000. The trustee may forfeit the whole or a part of his compensation by improper conduct in the management of his trust; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Moore v. Zabriskie*, 3 Green, 51.

In Alabama the compensation depends on the size of the estate and the labor involved; *Gould v. Hays*, 25 Ala. 432; though five per cent is common; *Woodruff v. Snedecor*, 68 Ala. 437; *Bendall v. Bendall*, 24 Ala. 306; but an allowance by the day may be given; *Magee v. Cowperthwaite*, 10 Ala. 968; or a gross sum given; *O'Neill v. Donnell*, 9 Ala. 738; expenses are allowed; *Hearriss v. Savage*, 16 Ala. 291; misconduct may forfeit the compensation; *Lyon v. Foscue*, 60 Ala. 468; *Gould v. Hays*, 25 Ala. 432.

In North Carolina trustees may receive five per cent and necessary expenses; *Walton v. Avery*, 2 Dev. & B. Eq. 405; *Turnage v. Greene*, 2 Jones Eq. 63; trustees may be charged compound interest, if they are at fault; *Thompson v. McDonald*, 2 Dev. & B. Eq. 471; a trustee *de son tort* will not be allowed compensation; *Hagler v. McCombs*, 66 N. C. 345.

In South Carolina the statutes allow two and a half per cent commission, but if the compensation is named in the declaration of trust that will control; *College v. Willingham*, 13 Rich. Eq. 195; ten per cent is allowed on income of sums invested, but this includes all travel and expenses; *Norton v. Gillison*, 4 Rich. Eq. 219; *Snow v. Callum*, 1 Des. 542. If trustees agree to serve without compensation, they can recover for their services; *M'Caw v. Blewit*, 2 McCord, Eq. 90; see as to additional compensation, *Sollee v. Croft*, 9 Rich. Eq. 474.

In Virginia the court allows five per cent of the receipts; *Kee v. Kee*, 2 Gratt. 132; *Triplett v. Jameson*, 2 Munf. 242; *Waddy v. Hawkins*, 4 Leigh, 458; this allowed for selling land; *Deanes v. Scriba*, 2 Call. 416; in specially difficult cases more is allowed; *Hipkins v. Bernard*, 4 Munf. 93; *M'Call v. Peachy*, 3 Munf. 306.

In Maryland from five to ten per cent is allowed; *Abbott v. Packet Co.* 4 Md. Ch. 315; from seven to three per cent is allowed for sale of land, as the amount increases; *Gibson's Case*, 1 Bland, 147; a daily allowance is not approved, but liberal expenses are allowed; *Northern C. R. Co. v. Keighler*, 29 Md. 572; *Dorsey v. Dorsey*, 10 Md. 471; provisions in trust deed will be disregarded; *Widener v. Fay*, 51 Md. 273.

In Tennessee five per cent is the usual allowance; *Stretch v. Gowdey*, 3 Tenn. Ch. 565.

In Georgia the trustee receives a commission; *Lowe v. Morris*, 13 Ga. 169; but he must not draw on the body of the estate; *Burney v. Spear*, 17 Ga. 225.

In Mississippi from five to ten per cent is allowed; *Cherry v. Jarratt*, 3 Cush. (Miss.) 221; *Merrill v. Moore*, 7 How. (Miss.) 292; this includes expenses; *Satterwhite v. Littlefield*, 13 Sm. & M. 306; sometimes an extra allowance is given; *Shirley v. Shattuck*, 6 Cush. (Miss.) 26.

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with an adverse eye (*e*); but if a person be merely a trustee to preserve contingent remainders, the reasons for excluding him are held not to be applicable (*f*).

15. **Factors, &c.**—In the absence of any special authority contained in the instrument of trust (*g*), a *trustee* or *executor* who happens to be a factor (*h*), broker (*i*), commission agent (*j*), or auctioneer (*k*), can make no profit in the way of his business from the estate committed to his charge. So trustees who are *bankers* cannot in their character of trustees borrow money of themselves, as bankers, at [*281] *compound interest, though it be the usage of the bank with ordinary customers (*a*).

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|---|--|
| (<i>e</i>) <i>Sykes v. Hastings</i> , 11 Ves. 364, per Lord Eldon, | (<i>h</i>) <i>Scattergood v. Harrison</i> , Mos. 128. |
| (<i>f</i>) <i>Sutton v. Jones</i> , 15 Ves. 587, per Lord Eldon. | (<i>i</i>) <i>Arnold v. Garner</i> , 2 Ph. 231. |
| (<i>g</i>) <i>Douglas v. Archbutt</i> , 2 De G. & J. 148; <i>Re Sherwood</i> , 3 Beav. 338. | (<i>j</i>) <i>Sheriff v. Axe</i> , 4 Russ. 33. |
| | (<i>k</i>) <i>Matthison v. Clarke</i> , 3 Drew. 3; <i>Kirkman v. Booth</i> , 11 Beav. 273. |
| | (<i>a</i>) <i>Crosskill v. Bower</i> , 32 Beav. 86. |

In Kentucky no sum is fixed, but a reasonable amount is allowed; *Lane v. Coleman*, 8 B. Mon. 571; *Greening v. Fox*, 12 B. Mon. 190, from five to ten per cent has been allowed; *M'Cracken v. M'Cracken*, 6 Mon. 342; *Floyd v. Floyd*, 7 B. Mon. 290; *Bowling v. Cobb*, 6 B. Mon. 358.

In Missouri executors receive not more than six per cent, but a gross sum may be allowed; *Smart v. Fisher*, 7 Mo. 581.

In California the trustee must be paid from the income; *Ellig v. Naglee*, 9 Cal. 683.

In Ohio executors are allowed a compensation, but trustees get only their expenses; *Gilbert v. Sutliff*, 3 Ohio St. 149.

In Illinois executors receive a compensation, but trustees do not; *Constant v. Matteson*, 22 Ill. 546; see *Hough v. Harvey*, 71 Ill. 72.

For further consideration of compensation, see *Perry on Trusts*, § 918, n.; and note to *Gibson's case*, 17 Am. Dec. 266.

In the provinces a commission is allowed. It may be a lump sum; *Stinson v. Stinson*, 8 R. R. 560; or a reasonable amount; *Re Toronto Harbor Com'rs*, 28 Chy. 195; *Re Berkeley's Trusts*, 8 R. R. 193; *McDonald v. Davidson*, 60 R. 320; *Deedes v. Graham*, 20 Chy. 258; *In re Town Trust*, 22 Chy. 377; *Heron v. Moffatt*, 7 P. R. 438; the trustee shall receive payment for all expenses incurred by him; *Life Association v. Walker*, 24 Chy. 293; *Bevis v. Boulton*, 7 Chy. 39; *Meighen v. Buell*, 24 Chy. 503; *Colonial Trust Co. v. Cameron*, 24 Chy. 548; including maintenance and education; *Stewart v. Fletcher*, 16 Chy. 235; where compensation is provided for in trust deed, it will be adhered to; *Heron v. Moffatt*, 7 P. R. 438; *Loveless v. Clarke*, 24 Chy. 14; *City Bank v. Mulson*, 3 Chy. Chamb. 334; when compensation will or will not be allowed, see *Wilson v. Proudfoot*, 15 Chy. 103; *Bald v. Thompson*, 17 Chy. 154.

16. **Solicitor.**—A trustee, whether expressly or constructively such (*b*), who is a *solicitor*, cannot charge for his professional labours, but will be allowed merely his costs out of pocket (*c*), unless there be a special contract or direction to that effect (*d*); and even then he cannot charge for matters not strictly belonging to the professional character, such as attendances for paying premiums on policies, for transfers of stock, attendances on proctors or auctioneers, attendances on paying legacies or debts (*e*), [unless such non-professional charges are expressly authorized. Where the will authorized a solicitor trustee to make the usual professional or *other proper and reasonable* charges for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not, charges for business not strictly of a professional character were allowed (*f*). But where the solicitor trustee was authorized to make the usual professional charges, and was to be entitled “to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time and trouble given and bestowed by him, in or about the execution of the trusts and powers of the will, or the management and administration of the trust estate, as if he, not being himself a trustee or executor, were employed by the trustee or executor,” non-professional charges were disallowed (*g*). And] a trustee who in that character invests the trust fund upon mortgage, and acts also for the mortgagor, is not accountable to the trust for the professional profits made by the mortgage and which are paid by the mortgagor (*h*).

Partners.—As the solicitor-trustee himself cannot charge,

(*b*) Pollard v. Doyle, 1 Dr. & Sm 319.

(*c*) New v. Jones, Exch. Aug. 9, 1833. 6 Byth. by Jarm. 338; Moore v. Frowd, 3 M. & Cr. 46; Fraser v. Palmer, 4 Y. & C. 515; York v. Brown, 1 Coll. 260; Broughton v. Broughton, 5 De G. M. & G. 160.

(*d*) In re Sherwood, 3 Beav. 338;

and see Douglas v. Archbutt, 2 De G. & J. 148.

(*e*) Harbin v. Darby, 28 Beav. 325.

[(*f*) Re Ames, 25 Ch. D. 72.]

[(*g*) Re Chapple, 27 Ch. D. 584; see the observations of Kay, J. in this case as to inserting a power authorizing non-professional charges.]

(*h*) Whitney v. Smith, 4 L. R. Ch. App. 513.

so neither can the charge be made by a *firm* of which he is a parther (*i*), even though the business be done by one of the partners who is not a trustee (*j*); but a country solicitor defending a suit in Chancery as executor, through a [*282] *town agent*, will be allowed such * proportion of the agent's bill in respect of the defence, as such agent is entitled to receive (*a*); and a trustee may employ his partner as the solicitor to the trust, and pay the usual professional charges, if by the articles of partnership the trustee is not to participate in the profits or have any benefit from such charges (*b*).

17. *Cradock v. Piper*.—In *Cradock v. Piper* (*c*), the principle of the rule was held not to apply where several *co-trustees* were made defendants to a suit, this being a matter thrust upon them and beyond their own control, so that one of the trustees, who was a solicitor, was allowed to act for himself and the others, and to receive the full costs, it not appearing that they had been increased through his conduct. But this decision is open to comment. If the distinction be made between costs out of court and costs in court, because as regards the latter, the conduct of the trustee is under the cognizance of the Court, and the costs are to be taxed, the rule would equally apply to the case of a single trustee defending himself (*d*). The exception appears to be anomalous, and is not likely to be extended. Indeed where a single trustee defended himself by his partner, the professional profits were disallowed (*e*).

18. *Trustee may accidentally be advantaged, as by failure of heirs of the cestui que trust*.—[Prior to the Intestates Estates Act, 1884, a trustee might by *possibility* have derived] a benefit from the trust estate, not from any positive right in himself, but from the want of right in any other; as if lands

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| (<i>i</i>) <i>Collins v. Carey</i> , 2 Beav. 128;
<i>Lincoln v. Windsor</i> , 9 Hare, 158. | & Tw. 617; overruling <i>Bainbrigg v. Blaire</i> , 8 Beav. 588. |
| (<i>j</i>) <i>Christophers v. White</i> , 10 Beav. 523. | (<i>d</i>) See <i>Broughton v. Broughton</i> , 2 Sm. & G. 422; 5 De G. M. & G. 160. |
| (<i>a</i>) <i>Burge v. Burton</i> , 2 Hare, 373. | (<i>e</i>) <i>Lyon v. Baker</i> , 3 De G. & Sm. 622. And see <i>Manson v. Baillie</i> , 2 Macq. H. L. Ca. 80. |
| (<i>b</i>) <i>Clack v. Carlon</i> , 7 Jur. N. S. 441. | |
| (<i>c</i>) 1 Mac. & G. 664; S. C. 1 Hall | |

were vested in A. and his heirs upon trust for B. and his heirs, and B. died without an heir, the equitable interest in this case could neither escheat to the lord (*f*); nor, if the trust were created by conveyance from B., whose *seisin* or title was *ex parte paternâ*, could the lands, upon failure of heirs in that line, descend to the heir of B. *ex parte maternâ* (*g*): but the trustee, no person remaining to sue a *subpœna*, retained, as the legal proprietor, the beneficial enjoyment (*h*). [But now where the death occurs since the 14th August, 1884, the law of escheat applies in the same manner as if the interest had been a legal estate in corporeal hereditaments (*i*).]

* 19. *Onslow v. Wallis*. — If an estate be held by [*283] A. upon trust for B., and B. dies without leaving an heir, but having devised the estate to C. and D. upon trusts which fail or do not exhaust the beneficial interests, A. cannot insist on retaining the estate upon offering to satisfy the charges, if any, but will be bound to convey the estate to C. and D. as the nominees in the will and so entitled as against A., the bare trustee, and the Court as between those parties will not inquire into the nature of the trust or how far it can be executed (*a*).

20. *Purchaser dying without heir after payment of purchase-money, and before conveyance*. — In *Burgess v. Wheate*, Sir Thomas Clarke, M. R., put the case of a purchaser paying the consideration money, and then dying without an heir before the execution of the conveyance. Whether under such circumstances the vendor should keep both the estate and the money? The M. R. thought that the vendor would keep the estate, but that the purchaser's personal representative would have a lien upon it for the purchase-money (*b*).

(*f*) *Burgess v. Wheate*, 1 Eden, 177. But as to a surplus dividend in the hands of trustees for creditors, see *Wild v. Banning*, 12 Jur. N. S. 404.

(*g*) See 1 Eden, 186, 216, 256.

(*h*) *Taylor v. Haygarth*, 14 Sim. 8; *Davall v. New River Company*, 3 De G. & Sm. 394; *Cox v. Parker*, 22

Beav. 168; *Barrow v. Wadkin*, 24 Beav. 9; and see *Attorney-General v. Sands*, Hard. 496; *Cary*, 14; *Burgess v. Wheate*, 1 Eden, 212, 213, 253.

[(*i*) 47 & 48 Vict. c. 71, s. 4.]

(*a*) *Onslow v. Wallis*, 1 Mac. & G. 506; and see *Jones v. Goodchild*, 3 P. W. 33.

(*b*) 1 Eden, 211, per Sir T. Clarke.

Mortgagor dying without an heir. — In the same case the questions were asked, whether in the event of a mortgagor in fee dying intestate as to real estate and leaving no heir, the mortgagee should hold the estate absolutely? and whether, if the mortgagee demanded his debt of the personal representative, he should take to himself both the land and the debt? Sir Thomas Clarke thought that the mortgagee might hold the estate absolutely; but, that if the mortgagee took his remedy against the personal representative, the Court would compel him to re-convey, not to the lord by escheat, but to the personal representative, and would consider the estate reconveyed as coming in lieu of the personalty, and as assets to answer even simple contract creditors (c). Lord Mansfield said, "He could not state on any ground established what would be the determination in that case" (d). Lord Henley observed, "The lord has his tenant and services in the mortgagee, and he has no right to anything more. Perhaps it would not be difficult to answer what would be the justice of the case, but it is not to the business in hand" (e). In the opinion of Sir John Romilly, M. R., the mortgagee held absolutely, subject to the payment of the mortgagor's debts out of the equity of redemption (f). [But since the late Act (g) the interest of the mortgagor will escheat to the lord.]

21. *Cestui que trust attainted for felony.* — But a failure of inheritable blood might before 4th July, *1870, have happened (a), not only for want of an heir, (as in the case of an illegitimate person dying without issue), but through the corruption of blood caused by attainder, for *petit treason* or *murder*; and in the case of such attainder, the question arose whether the trustee should hold against the heir of the person attainted. Under the system of *uses* the heir could not sue his *subpœna* by reason of the corruption of blood (b); but trusts have since been administered on

(c) Id. 210.

(d) 1 Eden, 236.

(e) Id. 256; and see Viscount Downe v. Morris, 3 Hare, 394.

(f) Beale v. Symonds, 16 Beav. 406.

[(g) 47 & 48 Vict. c. 71, s. 4.]

(a) See 33 & 34 Vict. c. 23.

(b) Br. Feff. al. Us. 34; Cary, 14.

more liberal principles than uses formerly were. In reference to this point, and also to the question, whether the trustee could hold against the person attainted himself if subsequently pardoned, Sir Thomas Clarke said, "The detaining the estate against the Crown where the *cestui que trust* dies without leaving a relation was different from detaining it against the *cestui que trust* himself. The Court would go as far as it could, and he thought the trustee would be estopped from setting up such a claim" (c). Lord Mansfield said, "He could not resolve the case upon principle, for he could find no clear and certain rule to go by" (d). But Lord Henley agreed with Sir Thomas Clarke, and asked, "If the King thinks proper to pardon the felon, what hinders him from suing his trustee? — what hinders him from instantly assigning his trust for the benefit of his family" (e).

22. **Whether the author of the trust can assert a claim.**—A question was put by Lord Mansfield in *Burgess v. Wheate*, but was neither answered at the time, nor received any notice from the bench afterwards, viz. whether the right to the estate might not, in particular cases, result to the *author* of the trust (f). As, if A. infeoffed B. and his heirs, in trust for C. and his heirs, and C. [before the 14th August, 1884, died] without heirs, could the equitable interest result in favour of A.? Such a case has never occurred, and there is no authority upon the subject; but it seems anomalous that a trust can under any circumstances result when the whole beneficial interest has been once parted with.

23. **Trustee cannot come into a court of equity for his own benefit.**—As the trustee when he can claim in these cases advances not a positive, but merely a negative right, he has no ground for coming into a court of equity for the establishment of his right (g). Thus, where A. devised a copyhold estate to B. and his heirs in trust for C. and his heirs, and C. died without heirs, and then B. died, having

(c) 1 Eden, 210.

(d) Id. 236; and see Id. 184.

(e) Id. 255.

(f) Id. 185. As in a gift of land in fee to a corporation, and the cor-

poration is dissolved or ceases, Co. Lit. 13 b.

(g) See Id. 212; and see *Onalow v. Wallis*, 1 Mac. & G. 506.

[*285] entered upon the lands, and having applied the *rents to the trust, but never having been admitted, and the heir of B. filed a bill against the lord for compelling him to grant him admission, Lord Loughborough said, "If a man has got the legal estate, the Court will not take it from him, except for some person who has a claim; but does it follow that the Court will *give* him the legal estate" (a). [But a Court of law will grant a *mandamus* to the lord to admit the heir of the trustee (b), and prior to the late Act the heir when admitted was entitled to hold the lands for his own benefit (c).]

24. If *cestui que trust die without next of kin*, the trust chattel goes to the Crown.—If a *cestui que trust* of *chattels*, whether *real or personal*, die intestate, without leaving any *next of kin*, the beneficial interest will not, in this case, remain with the trustee, but like all other *bona vacantia* will vest in the Crown by the prerogative (d). And the result will be the same where the *cestui que trust*, though not dying absolutely *intestate*, has appointed an *executor*, who by the language of the will itself is excluded from any beneficial interest (e). But an executor not expressly made a trustee by the will, was, before the Act of William IV. (f), entitled *primâ facie* to the surplus for his own benefit, and that statute it is conceived has converted him into a trustee for the *next of kin* only, and has not altered the old law, as between him and the *Crown*, in case there be no next of kin (g).

25. Trustee cannot set up title adverse to *cestui que trust*. — A trustee is, under no circumstances, allowed to set up a

(a) *Williams v. Lord Lonsdale*, 3 Ves. 752, see 756, 757.

[(b) *Rex v. Coggan*, 6 East, 481.]

[(c) *Gallard v. Hawkins*, 27 Ch. D. 298. See now 47 & 48 Vict. c. 71, s. 4.]

(d) If the intestate leave a widow and no next of kin the Crown takes a moiety of the personal estate; *Cave v. Roberts*, 8 Sim. 214.

(e) *Middleton v. Spicer*, 1 B. C. C. 201; *Taylor v. Haygarth*, 14 Sim. 8; *Russell v. Clowes*, 2 Coll. 648; *Powell v. Merrett*, 1 Sm. & G. 381; *Cradock*

v. Owen, 2 Sm. & G. 241; *Read v. Stedman*, 26 Beav. 495; [*Dillon v. Reilly*, 9 L. R. Ir. 57; *Re Mary Hudson's Trusts*, 52, L. J. N. S. Ch. 789; and see *Re Gosman*, 15 Ch. D. 67.] The foregoing were all cases of failure of next of kin of the author of the trust, but the principle of the decisions applies equally.

(f) 11 G. 4 & 1 W. 4, c. 40.

(g) See *ante*, p. 61; [so now decided *Re Knowles*, 49 L. J. N. S. Ch. 625.]

title *adverse* to his *cestui que trust* (h). But though he may not claim against his own *cestui que trust*, yet he is not bound to deliver over the property to his *cestui que trust* if he cannot safely do so by reason of notice of title in another which is paramount to the trust (i).

* 26. **Moral rights.**—Trustees would not be justified in doing any act at variance with their trust.

If, for instance, they honestly believed that property accepted by them in trust for one belonged of right to another, they would not be justified in communicating to such other that he could successfully claim the estate. Trustees have the custody of the property, but do not keep the conscience of their *cestui que trust*.

27. **Impeachable settlements.**—It sometimes happens that circumstances raise a *suspicion* but without any *constat*, that the trust deed is impeachable, as if the trust be created by a father tenant for life and a son claiming in remainder under an appointment in exercise of a special power, and there are grounds for surmising that the appointment was collusive, but the trustee must assume the validity of the trust until it is actually impeached (a).

(A) See *Attorney-General v. Munro*, 2 De G. & Sm. 163; *Stone v. Godfrey*, 5 De G. M. & G. 76; *Ex parte Andrews*, 2 Rose, 412; *Kennedy v. Daly*, 1 Sch. & Lef. 381; *Shields v. Atkins*, 3 Atk. 560; *Pomfret v. Windsor*, 2 Ves. 476; *Conry v. Caulfield*, 2 B. & B. 272; *Langley v. Fisher*, 9 Beav. 90; *Reece v. Trye*, 1 De G. &

Sm. 279; *Newsome v. Flowers*, 30 Beav. 461; *Frith v. Cartland*, 2 H. & M. 417; *Tennant v. Trenchard*, 4 L. R. Ch. App. 537; *Neligan v. Roche*, 7 I. R. Eq. 332.

(i) *Neale v. Davies*, 5 De G. M. & G. 258.

(a) *Beddoes v. Pugh*, 26 Beav. 407.

THE DUTIES OF TRUSTEES OF CHATTELS PERSONAL.

WE next advance to the *duties* of trustees, and as trusts of chattels personal are of the most frequent occurrence, we shall first advert to trustees of property of this description. We may consider this branch of our subject under six heads:—1. The reduction of the chattel into the possession of the trustee. 2. The safe custody of it. 3. The rules of the Court as to conversion. 4. The proper investment of the trust fund. 5. The liability of trustees to payment of interest in cases of improper detainer; and, 6. The distribution of the trust fund.

SECTION I.

OF REDUCTION INTO POSSESSION.

1. *Of reduction into possession.*—The first duty of trustees is to place the trust property in a state of security. Thus if the trust fund be an equitable interest of which the legal estate cannot at present be transferred to them, it is their duty to lose no time in giving notice of their own interest to the persons in whom the legal estate is vested; for otherwise he who created the trust might incumber the interest he has settled in favour of a purchaser without notice, who by first giving notice to the legal holder might gain a priority (a).¹

(a) See *Jacob v. Lucas*, 1 Beav. 436.

¹ *Trustee taking possession.*—The trustee upon his appointment, acceptance and qualification should proceed to take possession of the trust property. If there are notes, bonds, and other choses in action, the parties in any way interested in them should be notified; *Judson v. Corcoran*, 17 How. 614; *Foster v. Mix*, 20 Conn. 395; *Barney v. Douglass*, 19 Vt. 98; *Stewart v. Kirkland*, 19 Ala. 162; *Murdoch v. Finney*, 21 Mo. 138; *Ward v. Morrison*, 25 Vt. 593; *Bank v. Balliet*, 8 Watts & S. 311; *Fisher v. Knox*, 13 Pa. St. 622; but in some states an assignment of a chose in action is complete when the transfer is made, and before notice; *Conway v. Cutting*, 51 N. H. 408; *Garland v.*

2. **Chose en action.** — If the trust fund be a *chose en action*, as a *debt*, which may be reduced into possession, it is the trustee's duty to be active in getting it in; and any unnecessary delay in this respect will be at his own personal risk (*b*). A marriage settlement often contains a *covenant by one of the parties for payment of [*288] a certain sum to the trustees within a limited period, and if the Statute of Limitations be allowed to run so that the claim is barred, the trustees are answerable (*a*); and *a fortiori* the trustees will be responsible if they execute the settlement and sign a receipt for the money but do not actually receive it (*b*).

Prepayment. — Though trustees may be answerable for delaying *after* the proper time to get in a *chose en action*, there can be no objection to their receiving it *before* the time, if the person liable be willing to pay it (*c*). [And trustees of a reversionary *chose en action* may concur with the person entitled to the prior interest in calling for an immediate transfer to themselves of the *chose en action* (*d*).]

3. **Executors.** — There is no inflexible rule as to the time within which *executors* are bound to get in the assets; but in every case the particular circumstances must govern, and the Court allows the executors a large discretion (*e*). Thus

(*b*) Caffrey v. Darby, 6 Ves. 488; Platel v. Craddock, C. P. Cooper's Cases, 1837-8, 481; Jones v. Higgins, 2 L. R. Eq. 538; *Ex parte* Ogle, 8 L. R. Ch. App. 711; McGachen v. Dew, 15 Beav. 84; Wiles v. Gresham, 2 Drew. 258; Waring v. Waring, 3 Ir. Ch. Rep. 335; Tebbs v. Carpenter, 1 Mad. 298; Grove v. Price, 26 Beav. 103; and see Rowley v. Adams, 2 H. L. Cas. 725; Macken v. Hogan, 14 Ir. Ch. R. 220.

(*a*) Stone v. Stone, 5 L. R. Ch. App. 74.

(*b*) Westmoreland v. Holland, 23 L. T. N. S. 797; 19 W. R. 302; affirmed W. N. 1871, p. 124.

(*c*) Mills v. Osborne, 7 Sim. 30; Maskelyne v. Russell, W. N. 1869, p. 184.

[(*d*) Anson v. Potter, 13 Ch. D. 141.]

(*e*) Hughes v. Empson, 22 Beav. 183, *per* M. R.

Harrington, 51 N. H. 409; Warren v. Copelin, 4 Met. 594; Wood v. Partridge, 11 Mass. 488; Littlefield v. Smith, 17 Me. 327; Maybin v. Kirby, 4 Rich. Eq. 105. It has been held, however, that a payment by the debtor without notice will terminate his liability; Reed v. Marble, 10 Paige, 409; but not so if payment is made after notice; Judson v. Corcoran, 17 How. 614; Brashear v. West, 7 Pet. 608. The trustee must collect promptly the bills receivable, or become liable for the delay; Neff's App. 57 Pa. St. 91; Cross v. Petree, 10 B. Mon. 413; Hester v. Wilkinson, 6 Humph. 215.

if a testator die possessed of live stock which cannot be kept but at a great expense, the executors ought to sell forthwith (*f*). So executors would not be justified in continuing the testator's housekeeping expenses for an unreasonable time, but when they have acquainted themselves with the facts, should discharge the servants and break up the establishment; and an interval of two months was in one case, but under rather special circumstances, held to be justifiable (*g*). A testator died possessed of Crystal Palace shares, and it was contended that the executors were to be responsible for the value at the end of two months, but the Court held that they had a discretion whether to sell or not until the end of twelve months (*h*).

Buxton v. Buxton. — Where a great part of the assets was outstanding on *Mexican bonds*, and the executors sold in the course of the *second year* from the testator's decease, Lord Cottenham held that, if the executors were bound *at once* to convert the assets without considering how far it was for the interest of the persons beneficially entitled, there would of necessity be always an immediate sale, and often at a great sacrifice of property; that executors were entitled [*289] to exercise * a *reasonable discretion* according to the circumstances of the particular case. The will had directed the trustees to convert "with all convenient speed," but this, observed his Lordship, was the ordinary duty implied in the office of every executor (*a*). [So where a testator bequeathed his personal estate to his executors upon trust to divide the same equally among four persons, all of whom were of age, and the estate comprised foreign railway bonds which the executors retained beyond the end of the first year from the testator's death, it was held by the Court of Appeals affirming the decision of V. C. Hall, that as the executors acted with a view to what they thought beneficial to everybody interested, and in the exercise of their discretion thought it more prudent to wait, they ought not to suf-

(*f*) *Ib.*

(*g*) *Field v. Peckett* (No. 2), 29
Beav. 576.

(*h*) *Hughes v. Empson*, 22 Beav.

181.

(*a*) *Buxton v. Buxton*, 1 M. & Cr.

80.

fer because they had committed an error of judgment, and L. J. James observed, "It would be very hard upon executors who have been saddled with property of this speculative kind, and have endeavoured to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it was proved by the result, would have been the best course" (b).] But in *Grayburn v. Clarkson*, where the testator died possessed of shares in the Leeds Banking Company which involved a liability without limit, and the shares remained unsold for many years, L. J. Wood said that there was no fixed rule that conversion *must* take place by the end of one year, but that such was the *prima facie* rule, and that executors who did not convert by that time, must show some reason why they did not (c); and the Court directed an inquiry whether any loss had accrued by the neglect to sell by the end of one year from the death of the testator, and declared the executor responsible for any such loss (d). And again in *Sculthorpe v. Tipper* (e), where a testator died possessed of shares in an unlimited Banking Company, and directed his executors to realize his personal estate "immediately after his decease, or *so soon thereafter as his trustees might see fit so to do*," the trustees acting, as they believed, for the best interests of the parties, neglected for *two years and a quarter* to sell the shares, and they were made liable for the consequences, the Vice-Chancellor observing that although a discretion was vested in the trustees, they were bound to exercise it within a reasonable time, that is within a year. This has been considered a somewhat harsh decision. Had the testator simply directed the executors to realize immediately after his decease, * they would still have had the year, and the Vice- [*290] Chancellor therefore gave no effect to the words of the power, "or so soon thereafter as they might see fit." The question should rather have been, Was the discretion vested in them *bond fide* exercised? In another case where

[(b) *Marsden v. Kent*, 5 Ch. D. 598.]

(d) *Grayburn v. Clarkson*, 3 L. R. Ch. App. 605; and see *Sculthorpe v.*

(c) *Grayburn v. Clarkson*, 3 L. R. Ch. App. 606.

Tipper, 13 L. R. Eq. 232.

(e) 13 L. R. Eq. 232.

the trustees had an absolute discretion to sell and convert the testator's shares in a Banking Company "*at such time or times as they might think proper*," they were held not to be liable for retaining the testator's shares beyond a year from his decease, but were made liable for other new shares in the bank which they had purchased themselves (*a*).

[**Absolute discretion.** — And where an absolute discretion is given to the trustees to postpone the sale and conversion of the estate, they are not bound by the ordinary rule to convert the property within a year, even although it consists of shares in companies with unlimited liability, and in the absence of *mala fides* they will not be responsible for losses arising to the estate from the non-conversion (*b*).

4. **Retaining investments for infants in specie.** — Where it is for the benefit of infants to retain investments which are not authorized by the terms of the trust, the Court has a discretion to allow such retainer. The Court, however, will not exercise this discretion unless special circumstances are shown to exist, and the mere fact that the unauthorized securities are such as are authorized by § 21 of the Settled Land Act, 1882, and that a loss of income would be caused by a conversion, will not induce the Court to allow the securities to be retained (*c*).]

5. **Personal security.** — An executor is not to allow the assets of the testator to remain outstanding upon *personal* security (*d*), though the debt was a loan by the testator himself on what he considered an eligible investment (*e*). And it will not justify the executor, if he merely apply for payment through his attorney, but do not follow it up by

(*a*) *Edwards v. Edmunds*, 34 L. T. N. S. 522.

[(*b*) *Re Norrington*, 13 Ch. D. 654.]

[(*c*) *Fox v. Dolby*, W. N. 1883, p. 29.]

(*d*) *Lowson v. Copeland*, 2 B. C. C. 156; *Caney v. Bond*, 6 Beav. 486; *Bailey v. Gould*, 4 Y. & C. 221; and see *Attorney-General v. Higham*, 2 Y. & C. C. C. 634; where the *chose en action* is recoverable only in equity,

a *cestui que trust* may take active steps for getting it in, and as to the effect of *cestui que trust's* laches in this respect see *Paddon v. Richardson*, 7 De G. M. & G. 563; *Horton v. Brocklehurst* (No. 2), 29 Beav. 511.

(*e*) *Powell v. Evans*, 5 Ves. 839; *Bullock v. Wheatley*, 1 Coll. 130; and see *Tebbs v. Carpenter*, 1 Mad. 298; *Clough v. Bond*, 3 M. & Cr. 496.

instituting legal proceedings (*f*). Personal security changes from day to day, by reason of the personal responsibility of the debtor giving the security; and, as a testator's means of judging of the value of that responsibility are put an end to by his death, the executor who omits to get in the money within a reasonable time * becomes himself [*291] the security (*a*). An executor will be equally liable if he knows that a *co-executor* is a debtor to the testator's estate, and does not take the same active steps for recovery of the amount from the co-executor, as it would have been his duty to take against a stranger. And it does not vary the case that the testator himself was in the habit of leaving money in the hands of that co-executor, and treating him as a private banker (*b*). Nor will an executor be excused for not calling in money on personal security by a clause in the will, that the executors are to call in "*securities not approved by them*;" for such a direction is construed as referable to securities upon which a testator's property may allowably be invested, and not as authorizing an investment which the Court will not sanction (*c*). And if a settlement contain a clause that the trustees are to get in the money "whenever they shall think fit and expedient so to do," they will be liable, if they refrain from enforcing payment out of tenderness to the tenant for life without a due regard to the interests of *all* the *cestuis que trust* (*d*). If, however, it appears, or there is reasonable ground for believing, that had legal steps been taken they would have produced no useful result, the executor or trustee is not liable (*e*).

6. **Case of trust fund outstanding on mortgage.**—Money outstanding upon good *mortgage* security an executor is not called upon to realize, until it is wanted in the course of

(*f*) *Lowson v. Copeland*, 2 B. C. 428; and see *Scully v. Delany*, 2 Ir. C. 166. Eq. Rep. 166.

(*a*) *Bailey v. Gould*, 4 Y. & C. 226, (d) *Luther v. Bianconi*, 10 Ir. Ch. per Baron Alderson. Rep. 194.

(*b*) *Styles v. Guy*, 1 Mac. & G. 422; 1 Hall & Tw. 523; *Egbert v. Butter*, 21 Beav. 560; *Candler v. Tillet*, 22 Beav. 257. (e) *Clack v. Holland*, 19 Beav. 262; *Hobday v. Peters* (No. 3), 28 Beav. 603; *Alexander v. Alexander*, 12 Ir. Ch. Rep. 1; *Maitland v. Bateman*, 16 Sim. 233, note; *Walker v. Symonds*, 3 Sw. 71.

administration (*f*). "For what," said Lord Thurlow, "is the executor to do? Must the money lie dead in his hands, or must he put it out on fresh securities? On the original securities he had the testator's confidence for his sanction, but on any new securities it will be at his own peril" (*g*). But the trustee should ascertain that there is no reason to suspect the goodness of the security (*h*); and if it be not adequate, it is the duty of the trustee to insist on its being paid, though by the terms of the settlement every investment or change of investment is to be with the *consent* of the tenant for life who refuses, for nothing will justify conduct that puts the trust fund in danger (*i*).

7. **How money to be received by trustees.**—When [*292] the property is reduced into possession by actual * payment, [and the circumstances of the case are such as render it impracticable or highly inconvenient for both trustees to be present at the payment of the money (*a*), while both must join in signing the receipt, it is conceived that the money may be *paid* for the time to one without responsibility on the part of the other. In a recent case, however (*b*), Kay, J. expressed the opinion that it would be a breach of trust on the part of a trustee to allow his co-trustee to *receive* the trust money. But the early authorities on the point do not seem to have been considered, and it is conceived that the rule which was previously established (*c*), that a trustee joining in a receipt merely for the sake of con-

(*f*) *Orr v. Newton*, 2 Cox, 274; and see *Howe v. Earl of Dartmouth*, 7 Ves. 150.

(*g*) *Orr v. Newton*, 2 Cox, 276.

(*h*) See *Ames v. Parkinson*, 7 Beav. 384.

(*i*) *Harrison v. Thexton*, 4 Jur. N. S. 550.

[(*a*) If money be laid down on a table in the presence of all the trustees, that is a payment to all of them, and if one of them be commissioned by the others to take it to the bank, that is an act subsequent to the receipt of the money with which the person paying the money is not concerned; *per Kay, J. Re Flower* and

Metropolitan Board of Works, 27 Ch. D. 592, 599.]

[(*b*) *Re Flower* and *Metropolitan Board of Works*, 27 Ch. D. 592.]

[(*c*) See *ante*, p. 264; and the cases there cited note (*b*). It must however be borne in mind that the rule allowing a trustee to sign a receipt for the sake of conformity without actually receiving the trust-money was founded on *necessity*, and that as at the present day, through increased means of communication and locomotion and the facilities of passing money through banks, trustees can in most cases at very slight expense avoid the risk of putting the

formity is not responsible for money not actually received by him still remains in force.] But a trustee will not be justified in allowing the co-trustee to *retain* the money in his hands for a longer period than the particular circumstances of the case may *necessarily* require. And, indeed, the safer course, where practicable, is, that the money should not be handed to either of the trustees personally, but should, in the first instance, be paid into some bank of credit to their joint account (*d*).

8. **Receipts of trustees.** — If money be payable to A., who is simply a trustee for B., it would clearly be a breach of trust to pay it to the trustee against the wishes of the *cestui que trust* (*e*); and, on the other hand, if the nature of the trust be such that the person who has the money ready in his hands could not reasonably be expected to see to the application, he may pay safely to the trustee (*f*). Some recent cases in Ireland have gone further, and taken a distinction between monies which are *pure personalty* and monies payable on *sales* or *mortgages*. Thus, where the owner of a policy assigned it to a trustee for a minor without a power of signing receipts, the Master of the Rolls in Ireland expressed an opinion (for a decision was not *then called for), that if the Insurance Company [*293] were released from the debt by the person to whom they were liable at law, and whom the owner of the policy had constituted the trustee of it, they would not be answerable in equity for the execution of the trusts, and he did not understand how the rules applicable to purchasers of *real property* could be extended to debtors so as to implicate them in trusts created by their creditors (*a*). And in another case (*b*), where the insurer effected a policy for

trust-money, even for a moment, in the power of one of themselves, the cases in which they can escape liability on the plea of having signed merely for the sake of conformity are more restricted than formerly, and the plea is one which can only be relied upon under exceptional circumstances.]

[(*d*) See *ante*, p. 265.]

(*e*) *Pritchard v. Langher*, 2 Vern. 197.

(*f*) *Glynn v. Locke*, 3 Dru. & War. 11.

(*a*) *Fernie v. Maguire*, 6 Ir. Eq. Rep. 137.

(*b*) *Ford v. Ryan*, 4 Ir. Ch. Rep. 342.

700*l.*, and then assigned it to a trustee to pay 400*l.* to one, and 300*l.* to another, without an express power of signing receipts, and a *bonus* of 33*l.* was added to the policy, and the insurer being dead without a personal representative, and one of the *cestuis que trust* being also dead without a sufficient personal representative, and the other *cestui que trust* being in America, the company instituted an interpleader suit, — the Lord Chancellor of Ireland laid down the same distinction as the Master of the Rolls between a *personal debt* and money arising out of *real estate*, and held that the trustee could sign a discharge, and that the interpleader suit could not be sustained. The decision of the Lord Chancellor may have been correct, for the circumstance of one *cestui que trust* being abroad, and the other dead without a personal representative, as was also the insurer himself, may have justified the company in paying to the trustee; but the suggested distinction between pure personalty and money raised out of realty, until adopted by the English Courts, cannot be relied upon.

9. 22 & 23 Vict. c. 35. — By a late Act it is declared that where “*purchase or mortgage money shall be payable to a person upon any express or implied trust,*” and the payment is made *bond fide*, the receipt of the trustee “*shall effectually discharge the person paying the same, unless the contrary shall be expressly declared by the instrument creating the trust*” (c). It seems the better opinion that the clause applies only to trusts created since the Act, viz. 13*th August*, 1859, for how can a person expressly declare that an Act shall not apply when the Act itself does not exist?

10. 23 & 24 Vict. c. 145. — By a more recent Act (d), the receipts of trustees for any money generally payable to them under any trust or power created by a deed, will or other instrument executed after 28*th August*, 1860, were made sufficient discharges (e).

[11. 44 & 45 Vict. c. 41. — By a still more recent [*294] Act, which has repealed the last *enactment (a),

(c) 22 & 23 Vict. c. 35, s. 23.

(e) As to the doctrine of receipts

(d) 23 & 24 Vict. c. 145, ss. 29, 34; and see s. 12.

generally, see *post*, ch. xviii. s. 2.

[(a) 44 & 45 Vict. c. 41, s. 71.]

the receipts of trustees for any money securities or other personal property or effects payable, transferable or deliverable to them under any trust or power, and whether the trust be created before or after the commencement of the Act are made sufficient discharges (b).]

12. Receipt of a trustee who is known to intend a breach of trust. — Where the holder of the money knows that the trustee intends to commit a breach of trust, it would not be safe to pay to the trustee, whether he has by these Acts or otherwise a power of signing receipts or not. But the fact of such a knowledge must be brought home to the person paying, so as to make him *particeps criminis*, a privy to the fraud (c).

SECTION II.

OF THE SAFE CUSTODY OF CHATTELS.

1. Trustee must take same care of the trust property as of his own. — Lord Northington once observed, "No man can require or with reason expect that a trustee should manage another's property with the same care and discretion that he would his own" (d); but the maxim has never failed, as often as mentioned, to elicit strong marks of disapprobation. A trustee is called upon to exert precisely the *same* care and solicitude in behalf of his *cestuis que trust* as he would do for himself; but *greater* measure than this a Court of equity does not exact (e).¹

[(b) 44 & 45 Vict. c. 41, s. 36.]

(c) See *Ferne v. Maguire*, 6 Ir. Eq. Rep. 137.

(d) *Harden v. Parsons*, 1 Eden, 148.

(e) *Morley v. Morley*, 2 Ch. Cas. 2, per Lord Nottingham; *Budge v. Gummow*, 7 L. R. Ch. App. 720, per

V. C. Bacon; *Jones v. Lewis*, 2 Ves. 241, per Lord Hardwicke; *Massey v. Banner*, 1 J. & W. 247, per Lord Eldon; *Attorney-General v. Dixie*, 13 Ves. 534, per *eundem*; [*Re Speight*, 22 Ch. D. 739, per Jessel, M. R.; S. C. in D. P. 9 App. Cas. 19, per Lord Blackburn.]

¹ *Custody by the trustees.* — He must use due diligence in reducing the choses in action to possession. What is a reasonable time will depend largely upon the circumstances of the case, as it would be ill advised to sell property at a great sacrifice, when more could be obtained by waiting, and the trustee does his duty if he exercises a reasonable discretion; *Hester v. Wilkinson*, 6 Humph. 215; *Wills's App.* 22 Pa. St. 330. Even though the money had been placed by the settlor, the trustee must call it in, if it is

2. **Robbery of the trust property.**—A trustee in an old case, had kept in his house 40*l.* of trust money, and 200*l.* belonging to himself, and was robbed of both by his servant, and was held not to be responsible (*f*). An administratrix had left goods with her solicitor to be delivered to the party entitled. The articles were stolen; and the Court said it was the same as if they had been in the custody of the administratrix, and it was too hard to charge her with the loss (*g*). Lord Romilly, however, in a recent case, made a distinction between a loss arising from a *criminal act* [*295] done by a *stranger*, and a *criminal act* done by *an *agent* appointed by the trustee himself, and held that in the latter case, but aggravated by circumstances of carelessness, and where both parties were innocent, the trustee was liable (*a*).

3. **Chattels passing by delivery.**—Where there are several trustees, as they cannot all have the custody of the property,

(*f*) *Morley v. Morley*, *ubi supra*; (*g*) *Jones v. Lewis*, 2 Ves. 240.
and see *Jones v. Lewis*, 2 Ves. 241; (*a*) *Bostock v. Floyer*, 1 L. R. Eq.
Ex parte Belchier, Amb. 220; *Ex* 28; 35 Beav. 603; [and see *Re Brier*,
parte Griffin, 2 Gl. & J. 114. But see 26 Ch. D. 238.]
Sutton v. Wilders, 12 L. R. Eq. 377.

not invested as wisely as it should have been, if the trustee had made the investment; *Pray's App.* 34 Pa. St. 100; *Hemphill's App.* 18 Pa. St. 303; and if necessary follow up his demand with suit; *Wolfe v. Washburn*, 6 Cow. 261. A trustee should not compromise a claim unless he can show the impossibility of getting more; *Bacot v. Heyward*, 5 S. C. 441.

If a trustee personally owes the trust estate, he must consider his debt as assets received, and if he should not prove the claim against himself if bankrupt, he would continue liable even after his discharge; *Pettee v. Peppard*, 120 Mass. 523; *Hazleton v. Valentine*, 118 Mass. 472; *Chenery v. Davis*, 16 Gray, 89; *Prindle v. Holcomb*, 45 Conn. 111; and acceptance of a trust makes the trustee's previous indebtedness stand as collected assets; *Ipawich Co. v. Story*, 5 Met. 301; *Stevens v. Gaylord*, 11 Mass. 269.

The trustee must use the same caution and judgment in the case of the trust property that he would if the property were his own; *Carpenter v. Carpenter*, 12 R. I. 544; *Taylor v. Benham*, 5 How. 233; *Campbell v. Miller*, 38 Ga. 304; *Gould v. Chappell*, 42 Md. 466; *King v. Talbot*, 50 Barb. 453.

If the trustee deposit the trust funds in his own name, he will be liable for any loss that results by consequence of the failure of the bank; *School Dist. Greenfield v. First National Bank*, 102 Mass. 174; *Mason v. Whitthorne*, 2 Cold. 242.

If the trustee mix the trust funds with his own the *cestui que trust* may claim all that the trustee cannot positively identify; *Morrison v. Kinstra*, 55 Miss. 71.

if the subject of the trust be articles which pass by delivery, as plate, they should be deposited with the bankers of the trustees (*b*). As to stocks transferred by delivery and payable to bearer, as Spanish bonds, Vice-Chancellor Wood observed, that "no doubt the bonds might be kept at the bankers' in a box with *three locks*, opened by *three different keys*, one to be kept by each of the three trustees; but as the interest was payable upon *coupons* twice a year, so that the box must be opened as often for that purpose, he thought that ordinary prudence did not require such a course to be adopted, more particularly as it would be the bankers' duty to see that the *coupons* only were taken out of the box, and that neither the box nor the securities were removed"; and so it was decided (*c*).

[Where Russian Railway bonds which passed by delivery were purchased by two trustees, and each of the trustees took possession of a moiety of the bonds, but one of the trustees disposed of the moiety held by him and applied the proceeds for his own purposes, it was held that the other trustee was liable for the misapplication, as it was the duty of the trustees where the bonds were transferable by delivery to take care that no improper disposition could be made of them (*d*).]

4. **Insurance.**—An executor has been held *not* to be answerable for having omitted to secure the safety of *leasehold* premises by *insuring* them against fire (*e*).

5. **Trustee should place trust money in a responsible bank, but not to his own credit.**—If the subject of the trust be *money*, it may be deposited for *temporary* purposes in some responsible banking-house (*f*), but in such a manner that

(*b*) *Mendes v. Guedalla*, 2 J. & H. 259.

(*c*) *Mendes v. Guedalla*, 2 J. & H. 259; *Consterdine v. Consterdine*, 31 Beav. 331; and see *Matthews v. Brise*, 6 Beav. 239.

[(*d*) *Lewis v. Nobbs*, 8 Ch. D. 591.]

(*e*) *Bailey v. Gould*, 4 Y. & C. 221; and see *Ex parte Andrews*, 2 Rose, 410; *Dobson v. Land*, 8 Hare, 216; *Fry v. Fry*, 27 Beav. 146.

(*f*) *Routh v. Howell*, 3 Ves. 565; *Jones v. Lewis*, 2 Ves. 241, *per* Lord Hardwicke; *Adams v. Claxton*, 6 Ves. 226; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Attorney-General v. Randall*, 21 Vin. Ab. 534, *per* Lord Talbot; *Massey v. Banner*, 1 Jac. & W. 248, *per* Lord Eldon; *Horsley v. Chaloner*, 2 Ves. 85, *per* Sir J. Strange; *France v. Woods*, Taml. 172; *Lord Dorchester v. Earl of*

[*296] the *cestuis que trust* may follow the fund *into the hands of the bankers (a), and it is no objection that the bank allows interest on the deposits (b). [But the trustees must not allow the money to remain on deposit longer than the circumstances of the trust require, and where a mortgage was paid off, and the money was placed on deposit at a bank as an interim investment, until a permanent investment could be found, and remained on deposit for fourteen months when the bank failed, the trustees were held liable for the loss (c). And] if the trustee pay the money to his *own credit* and not to the separate account of the trust estate (d), or if he allow the drafts of another person to be honoured who draws upon the account and misapplies the money (e), the trustee will be personally liable for the consequences.

6. **Trustee must not put the trust-fund out of his own control.**—And a trustee must not lodge the money in such a manner as to *put it out of his own control*, though it be not under the control of another. White, a receiver appointed by the Court, in order to induce Adams and Burlton to become his sureties, entered into an arrangement with them, that the rents, as received, should be deposited in a bank in the joint names of the sureties, and that all drafts should be in the *handwriting* of Anderson, who was Adams' partner, and should be signed by White. An account was opened upon this footing, and the bank failed, and a considerable loss was incurred. Sir J. Leach held that the receiver and his sureties were not to be answerable (f); but his Honour's decision

Effingham, Id. 279; Wilks v. Groom, 3 Drew. 584; Johnson v. Newton, 11 Hare, 160; Swinfen v. Swinfen (No. 5), 29 Beav. 211.

(a) *Ex parte* Kingston, 6 L. R. Ch. App. 632.

(b) *Re* Marcon's Estate, W. N. 1871, p. 148; 40 L. J. N. S. Ch. 537.

[(c) Cann v. Cann, 33 W. R. 40; 51 L. T. N. S. 770.]

(d) Wren v. Kirton, 11 Ves. 377; Fletcher v. Walker, 3 Mad. 73; Macdonnell v. Harding, 7 Sim. 178;

Matthews v. Brise, 6 Beav. 289; Massey v. Banner, 1 J. & W. 241. See observations of L. J. K. Bruce and L. J. Turner on this case in Pennell v. Deffell, 4 De G. M. & G. pp. 386, 392.

(e) Ingle v. Partridge, 32 Beav. 661; 34 Beav. 411; Evans v. Bear, 10 L. R. Ch. App. 76; and see Hardy v. Metropolitan Land and Finance Company, 7 L. R. Ch. App. 427; reversing S. C. 12 L. R. Eq. 386.

(f) Salway v. Salway, 4 Russ. 60.

was reversed on appeal by the Lord Chancellor (*g*); and this reversal was afterwards affirmed on the final appeal by the House of Lords (*h*).

7. **Whether executors may place money in bank payable to either of the co-executors.**—In a case before Sir A. Hart, in Ireland, an executor was held to be justified, though he had placed the assets in a bank so as to be under the control of the co-executor. The money was entered in the books to the *joint* account of the co-executors, but the bank was in the habit of answering the cheques of either *co-executor *singly*. "It is the custom of bankers," [*297] said Lord Chancellor Hart, "that what is deposited by one to the joint account may be withdrawn by the cheque of the other; and for convenience of business, it is necessary this risk should be incurred, for it would be very hard to transact business if every cheque should be signed by all the executors" (*a*). However, his Lordship admitted that "if there were any fraud or collusion, wilful default or gross neglect, or if the executor had any reason to put a stop to the mismanagement by the co-executor, the case would be altered" (*b*). But even with this qualification the doctrine is so contrary to the principle of other cases that no trustee or executor could be advised to rely upon it in practice (*c*).

8. **Trustee responsible for bank if he ought not to have placed the money there.**—The trustee will also be answerable for the failure of the bank, if he deposited the money there for safe custody, when it was his clear duty to have invested it in the funds for improvement (*d*), or if he left it there when he ought to have paid it to new trustees duly appointed (*e*), or into Court (*f*); or if when the purposes of

(*g*) 2 R. & M. 215.

(*h*) Id. 220. See the argument of Lord Brougham stated from MS. in 3d Edition, p. 335.

(*a*) *Kilbee v. Sneyd*, 2 Moll. 186, see 200, 213.

(*b*) Id. 203, 213.

(*c*) See *Clough v. Dixon*, 8 Sim. 594; 3 M. & Cr. 490; *Gibbins v. Taylor*, 22 Beav. 344; *Ingle v. Partridge*, 32 Beav. 661; 34 Beav. 411.

(*d*) *Moyle v. Moyle*, 2 R. & M. 710; Sir W. P. Wood in *Johnson v. Newton*, 11 Hare, 160, called it a very strong case, and hard upon the executors.

(*e*) *Lunham v. Blundell*, 4 Jur. N. S. 3.

(*f*) *Wilkinson v. Berwick*, 4 Jur. N. S. 1010.

the trust do not require a balance to be kept in hand he lend a sum to the bank at interest upon no other security than their notes, for this in effect cannot be distinguished from an ordinary loan on personal security, which the Court never sanctions (*g*). And if the trustees ought not under the circumstances to have left *so large* a balance in the hands of the bankers, they will be liable for the excess beyond the proper balance (*h*). But trustees will not be liable for having left moneys in the hands of a respectable bank during the first year from the testator's death, when there are no special directions in the will for investment, and the estate has not been wound up (*i*). But they will be liable, if, during the first year they draw out of one bank money which ought, by the will, to be invested in Government stocks, and deposit it in another bank at interest, for this is an irregular investment and not a deposit; and a direction in the will that the trustees should not be liable for any *banker* was held not to be material (*j*).

9. **Mixing the trust property with private property.**—The trustee, wherever the trust property may be placed, [*298] * must always be careful not to amalgamate it with his own, for, if he do, the *cestui que trust* will be held entitled to every portion of the blended property, which the trustee cannot prove to be his own (*a*).

SECTION III.

OF CONVERSION.

1. **General principle.**—Express trusts for conversion, must, of course, be strictly pursued according to the directions (*b*),

(*g*) *Darke v. Martyn*, 1 Beav. 525.

(*h*) *Astbury v. Beasley*, 17 W. R. 638.

(*i*) *Johnson v. Newton*, 11 Hare, 160; *Swinfen v. Swinfen* (No. 5), 29 Beav. 211.

(*j*) *Rehden v. Wesley*, 20 Beav. 213.

(*a*) *Lupton v. White*, 15 Ves. 432; and *Panton v. Panton*, cited *Ib.* 440;

Chedworth v. Edwards, 8 Ves. 46; *White v. Lincoln*, 8 Ves. 363; *Fellows v. Mitchell*, 1 P. W. 83; *Gray v. Haig*, 20 Beav. 219; *Duke of Leeds v. Amherst*, 20 Beav. 239; *Mason v. Morley* (No. 1), 34 Beav. 471, and S. C. (No. 2), *Ib.* 475; *Cook v. Addison*, 7 L. R. Eq. 466.

(*b*) See *Craven v. Craddock*, 20 L. T. N. S. 638.

and where the trustees have a discretionary *power* to convert or not, or at such time as they may think fit, the Court cannot interfere with the exercise of the power (*c*). But besides express trusts of this kind, there is frequently imposed upon trustees a duty to convert, not directed in terms, but arising out of the nature of the property and the relation in which *cestuis que trust* stand to each other.¹

2. *Implied conversion in cases of bequests of wasting property to persons in succession.* — As a general rule, if a testator give his personal estate (*d*), or the residue of his personal estate (*e*), or the interest of his property (*f*), in trust for or directly to (*g*) several persons in succession, and the subject of the bequest is of a wasting nature, as leaseholds, long annuities, &c., the Court implies the intention that such perishable estate should assume a permanent character, and so become capable of succession. The Court accordingly, in these cases, directs a conversion into 3 per cent. Bank Annuities, and trustees and executors are bound to observe the same rule in their administration of property out of Court, and if they fail to do so, will be liable as for a breach of trust (*h*).

(*c*) *In re Sewell's Trusts*, 11 L. R. Eq. 80. See *ante*, p. 288.

(*d*) *Howe v. Earl of Dartmouth*, 7 Ves. 137.

(*e*) *Cranch v. Cranch*, cited *Howe v. Earl of Dartmouth*, 7 Ves. 141, note; *Powell v. Cleaver*, cited *Ib.* 142; *Lichfield v. Baker*, 2 Beav. 481; *Crawley v. Crawley*, 7 Sim. 427; *Suther-*

land v. Cooke, 1 Coll. 498; *Johnson v. Johnson*, 2 Coll. 441; *Re Shaw's Trust*, 12 L. R. Eq. 124.

(*f*) *Fearn v. Young*, 9 Ves. 549; *Benn v. Dixon*, 10 Sim. 636. See *Oakes v. Strachey*, 13 Sim. 414.

(*g*) *House v. Way*, 12 Jur. 959.

(*h*) *Bate v. Hooper*, 5 De G. M. & G. 338. [As to the power of trustees

¹ *Conversion.* — There may be trusts for conversion, as where the trust property is to be sold and the proceeds invested or used in the purchase of other property, or the trusts may be intended to give the *cestui que trust* the enjoyment of certain specified property. Whether a trust belongs to the one class or the other depends upon the construction or interpretation put upon the declaration of trust, and the facts and circumstances of the particular case; *Hidden v. Hidden*, 103 Mass. 59.

Ordinarily, where the trust property is of such a nature that it will gradually and constantly diminish in value, it becomes the duty of the trustee to convert it into such securities as the law will allow him to accept; this is more emphatically true of property of a perishable nature.

If there is a gift of specific property, there may be an implied intention to have that particular property remain in trust; *Harrison v. Foster*, 9 Ala. 955; *Dunbar v. Woodcock*, 10 Leigh, 628.

[*299] *3. **Intention to give right of enjoyment in specie may be collected from the bequest.**—But an intention that the property should be enjoyed *in specie* may appear from the form of the bequest, or be collected from the terms in which it is expressed. Thus if there be a *specific bequest* of leaseholds or of stock the specific legatee will take the rents or dividends (*a*). And a power of varying the securities expressly given to the executors will not prejudice the right of the specific legatee, for the testator is held to have given the executors the authority, not with the intention of varying the relative rights of the legatees, but merely with the view of adding security to the property (*b*).

4. **Use of word "rents."**—Again, if after a mention of leaseholds, there is a general direction to pay *rents* to the tenant for life, this is held sufficient to prevent the application of the general rule (*c*), though it is doubtful upon the authorities whether the use of the word *rents* in connection with a gift containing no mention of leaseholds would have the same effect (*d*). A mere mention of "dividends" is certainly not sufficient to authorize the nonconversion of ter-

to invest otherwise than in 3 per cent. Bank Annuities, see *post*, sect. 4 of this chapter.]

(*a*) *Vincent v. Newcombe*, Younge, 599; *Lord v. Godfrey*, 4 Mad. 455. But it is not necessary that the bequest should technically be specific in order to entitle the tenant for life to enjoy the income in specie; see *Pickering v. Pickering*, 4 M. & Cr. 299; *Hubbard v. Young*, 10 Beav. 205; *Harris v. Poyner*, 1 Drew. 181. The case of *Mills v. Mills*, 7 Sim. 501, is contrary to the other authorities, and is not law.

(*b*) *Lord v. Godfrey*, 4 Mad. 455; and see *Morgan v. Morgan*, 14 Beav. 72; *Re Llewellyn's Trust*, 29 Beav. 171. [If leaseholds which a tenant for life is entitled to enjoy *in specie*, be taken by a Company under the provisions of the Lands Clauses Consolidation Act, or sold under the Settled Estates Act, the purchase-money should be converted into an

annuity having the same duration as the lease, which should be paid to the person who would for the time being have received the rents of the leaseholds. *Askew v. Woodhead*, 14 Ch. D. 27; *Re Walsh's Trusts*, 7 L. R. Ir. 554. As to the application of the purchase-money in the case of sales under the Settled Land Act, 1882, of leasehold or reversionary interests; see sect. 34 of the Act.]

(*c*) *Blann v. Bell*, 2 De G. M. & G. 775; *Crowe v. Crisford*, 17 Beav. 507; *Hood v. Clapham*, 19 Beav. 90; *Marshall v. Bremner*, 2 Sm. & G. 237; *Re Elmore's Trusts*, 6 Jur. N. S. 1325; and see *Thursby v. Thursby*, 19 L. R. Eq. 395.

(*d*) See *Goodenough v. Tremamondo*, 2 Beav. 512; *Hunt v. Scott*, 1 De G. & Sm. 219; *Wearing v. Wearing*, 23 Beav. 99; *Pickup v. Atkinson*, 4 Hare, 624; *Craig v. Wheeler*, 29 L. J. N. S. Ch. 374; *Vachell v. Roberts*, 32 Beav. 140.

minable annuities (*e*). But a bequest of the testator's public funds or government annuities (*f*), or of the "interest, dividends, or income of all monies or stock, and of all other property yielding income at the testator's death" has been held to be specific (*g*).

5. **Conversion directed at a later period.** — And if a testator negative a sale at the time of his death by authorizing or directing a conversion at a subsequent period (*h*);

*or if he use any other expressions which assume [*300] the leaseholds or stock to be unconverted when by the general rule it would be converted, the doctrine of conversion is excluded (*a*).

6. **Rule does not assume intention of a sale.** — The rule of the Court under which perishable property is converted does not proceed upon the assumption that the testator in fact intended his property *to be sold* but is founded upon the circumstance that the testator intended the perishable property to be enjoyed by different persons in succession, which is accomplished by means of a sale (*b*). The Court presumes that intention unless a contrary intention appear on the face of the will, and the only difficulty is, what will constitute a sufficient indication of a contrary intention, the more recent decisions allowing smaller indications to prevail than were formerly deemed necessary (*c*).

7. **Rule as to conversion where property is not wasting, but of a class not authorized by the Court.** — The object of the

(*e*) *Blann v. Bell*, 2 De G. M. & G. 775; *Hood v. Clapham*, 19 Beav. 90; and see *Sutherland v. Cooke*, 1 Coll. 503; *Neville v. Fortescue*, 16 Sim. 333; *Pidgeon v. Spencer*, 16 L. T. N. S. 83.

(*f*) *Wilday v. Sandys*, 7 L. R. Eq. 455.

(*g*) *Boys v. Boys*, 28 Beav. 436.

(*h*) *Daniel v. Warren*, 2 Y. & C. C. 290; *Bowden v. Bowden*, 17 Sim. 65; *Burton v. Mount*, 2 De G. & Sm. 383; *Alcock v. Sloper*, 2 M. & K. 699; [*Simpson v. Lester*, 4 Jur. N. S. 1269; *Gray v. Siggars*, 15 Ch. D. 74; *Re Leonard*, 29 W. R. 234; 43 L. T. N. S. 664;] *Hind v. Selby*, 22

Beav. 373; *Skirving v. Williams*, 24 Beav. 275; *Harvey v. Harvey*, 5 Beav. 134; *Hinves v. Hinves*, 3 Hare, 609; *Rowe v. Rowe*, 29 Beav. 276.

(*a*) *Collins v. Collins*, 2 M. & K. 703; see observations on this case in *Vaughan v. Buck*, 1 Ph. 78; *Lichfield v. Baker*, 13 Beav. 451; *Harris v. Poyner*, 1 Drew. 180; and contrast with the last case *Chambers v. Chambers*, 15 Sim. 190.

(*b*) *Cafe v. Bent*, 5 Hare, 35.

(*c*) *Craig v. Wheeler*, 29 L. J. N. S. Ch. 374; *Morgan v. Morgan*, 14 Beav. 82. [See *Macdonald v. Irvine*, 8 Ch. D. 101.]

rule, under which a direction to convert wasting property is implied, being to secure a fair adjustment of the rights of the tenant for life and those coming after him, it follows that where a residue which, without any express trust for conversion, is bequeathed to persons in succession, consists of property which, though not wasting, is of a class producing a high rate of interest in proportion to its money value, and liable consequently to additional risk such as railway shares, shares of insurance or other companies, foreign bonds, or stocks, &c., the persons entitled in expectancy have a right to call for the conversion of such property into Three per Cent. Stock (*d*).

8. **Case of debts.**— Even where the general estate or residue is directed to be enjoyed *specifically*, the tenant for life is not entitled to enjoy in specie what is not an investment, but a mere debt (*e*), and a special power for the executors and trustees “to *continue* invested any of the testator’s *government securities*” will not justify the trustees in continuing *long annuities* (*f*).

[*301] *9. **Direction for investment of personal estate and accumulations of income in land.**— If a testator direct that his personal estate shall be converted and laid out in a purchase of lands, to be settled upon A. for life, with remainders over, and that *the interest of the personal estate shall be accumulated and laid out in a purchase of lands* to be settled to the same uses, the Court to prevent the hardship that would fall upon the tenants for life, if the purchases were deferred for a long period, either from unavoidable circumstances, or from the dilatoriness of the trustee, interprets the intention in such cases to be that the accumulation should be confined to one year from the testator’s death. At the expiration of that period, the Court presumes the trustees to

(*d*) *Thornton v. Ellis*, 15 Beav. 193; *Blann v. Bell*, 5 De G. & Sm. 658; 2 De G. M. & G. 775; *Wightwick v. Lord*, 6 H. L. Cas. 217. But the Court will not allow a mortgage to be called in, without an inquiry whether it is for the benefit of all

parties to do so; *per Lord Eldon*, in *Howe v. Dartmouth*, 7 Ves. 150.

(*e*) *Holgate v. Jennings*, 24 Beav. 630, *per M. R.*; but it may be doubted whether the general doctrine laid down was rightly applied.

(*f*) *Tickner v. Old*, 18 L. R. Eq. 422.

be in a condition to invest the personal estate, and gives the tenant for life the interest from that time (*a*).

Devise of real estate upon trust to sell and invest proceeds and rents until sale. — And, conversely, if a testator devise his real estate to be sold and the produce thereof, and also the *rents and profits of the said estate in the meantime, to be laid out in Bank Annuities or other securities*, upon trust, for A. for life, with remainders over, the accumulation of the rents is not extended beyond one year from the testator's death, but the tenant for life is entitled to them from that period (*b*).

10. Produce during first year from testator's death. — From the language used by Lord Eldon, in the case of *Sitwell v. Bernard* (*c*), (in which the rule, that the accumulation, where expressly directed, extends only to one year from the testator's death, was first established,) an impression prevailed that in no case was the tenant for life entitled to the income during the first year of the fund or land directed to be converted, and both Sir John Leach (*d*), and Sir Thomas Plumer (*e*), sanctioned this doctrine by their authority. However, Lord Eldon had no intention of laying down any such rule (*f*), and it has since been settled that where there is no express direction to accumulate, the tenant for life has an interest in the first year's income (*g*), but an interest varying according to the circumstances of the case, as will appear from the following distinctions.

(*a*) **Income of property applied in paying legacies.** — The tenant for life of a residue is not entitled to the income accruing during the delay allowed for the *payment of legacies*

(*a*) *Sitwell v. Bernard*, 6 Ves. 520; 13 Beav. 288; *Beanland v. Halliwell*, 1 C. P. Cooper, t. Cottenham, 169, note (*a*).

(*c*) 6 Ves. 520.

(*d*) *Stott v. Hollingworth*, 3 Mad. 161.

(*e*) *Taylor v. Hibbert*, 1 J. & W. 308.

(*f*) See *Angerstein v. Martin*, T. & R. 238; *Hewitt v. Morris*, Ib. 244.

(*g*) *Macpherson v. Macpherson*, 16 Jur. 847.

(*b*) *Noel v. Lord Henley*, 7 Price, 251; *Vickers v. Scott*, 3 M. & K. 500; and see *Vigor v. Harwood*, 12 Sim. 172; *Greisley v. Earl of Chesterfield*,

on so much of the testator's property as is subsequently applied in paying *them (a). Executors, as between themselves and the persons interested in the residue, are at liberty to have recourse to any funds they please for payment of debts and legacies, but in adjusting the accounts between the tenant for life and remainderman, they must be taken to have paid the debts and legacies not out of capital only or out of income only, but with *such portion of the capital, as together with the income of that portion for one year from the testator's death, was sufficient for the purpose* (b). As to *contingent legacies* which may or may not become payable, the tenant for life is, from a rule of convenience, entitled to the income of the fund as part of the residue, until the contingency arises (c).

(β) **Where funds are in the state they ought to be.**—If a testator desire that his personal estate shall be laid out and invested either in Government or real securities, in trust for A. for life, with remainders over (d), or in a purchase of lands with a direction express (e) or implied (f) for the investment thereof in the mean time in Government or real securities, and that the lands to be purchased shall be in trust for A. for life, with remainders over, the income of the *Government and real securities* of which the testator was possessed at the time of his death (these being the very investments contemplated by his will), belongs *from the time of the death* to the tenant for life.

(γ) **Where the proper investment is made before the end of the year.**—If, during the first year, the *conversion* directed by the testator is *actually made*, the tenant for life is also

(a) *Holgate v. Jennings*, 24 Beav. 623; *Crawley v. Crawley*, 7 Sim. 427; *Cranley v. Dixon*, 23 Beav. 512; *Fletcher v. Stevenson*, 3 Hare, 371; *Allhusen v. Whittell*, 4 L. R. Eq. 295; as to the principle to be applied where the debt is compromised, see *Mac-laren v. Stainton*, 4 L. R. Eq. 448.

(b) *Allhusen v. Whittell*, 4 L. R. Eq. 295; *Lambert v. Lambert*, 16 L. R. Eq. 320; *Marshall v. Crowther*, 2 Ch. D. 199.

(c) *Allhusen v. Whittell*, 4 L. R. Eq. 305.

(d) *Hewitt v. Morris*, T. & R. 241; *La Terriere v. Bulmer*, 2 Sim. 18; *Allhusen v. Whittell*, 4 L. R. Eq. 295.

(e) *Angerstein v. Martin*, T. & R. 232.

(f) *Caldecott v. Caldecott*, 1 Y. & C. C. C. 312, 737.

entitled to the produce of the property, in its converted form, from the time of the conversion, as if land be directed to be sold, and the produce invested in Government or real securities (*g*), or money be directed to be laid out on land (*h*), the tenant for life is entitled to the dividends or interest in the first case, from the time of the sale and investment, and to the rents in the latter case from the time of the purchase, though made in the course of the first year.

(*δ*) **Where the funds are not at the testator's death in the state they ought to be.**—Where, at the death of the testator, the property is not in the state in which it is directed to be, the tenant for life is, before *the conversion, [*303] entitled, as the Court has now decided, not to the actual produce, but to a reasonable fruit of the property, from the death of the testator up to the time of the conversion, whether made in the course of the first year, or subsequently; as if personal estate be directed to be laid out in Government or real securities, and part of the personal estate consists of bonds, bank stock, &c. (not being Government or real securities), the tenant for life is entitled to the dividends *from the death of the testator on so much of 3 per cent. Consolidated Bank Annuities as such part of the personal estate, not being Government or real securities, would have purchased at the expiration of one year from the testator's death (a).*

(*g*) *La Terriere v. Bulmer*, 2 Sim. 18; *Gibson v. Bott*, 7 Ves. 89.

(*h*) See *Angerstein v. Martin*, T. & R. 240.

(*a*) *Dimes v. Scott*, 4 Russ. 195. In *Douglas v. Congreve*, 1 Keen, 410, the M. R. gave the tenant for life the actual interest of the personal estate making interest from the death of the testator until the end of one year; and in *Robinson v. Robinson*, 1 De G. M. & G. 247, the tenant for life was allowed 4 per cent. from the expiration of one year; but in the cases of *Taylor v. Clark*, 1 Hare, 161; *Morgan v. Morgan*, 14 Beav. 72; *Holgate v. Jennings*, 24 Beav. 623; *Brown v. Gellatly*, 2 L. R. Ch. App. 752; *Allhusen v. Whittell*, 4 L. R. Eq. 295;

Re Llewellyn's Trust, 29 Beav. 171; *Hume v. Richardson*, 4 De G. F. & J. 29, the authority of *Dimes v. Scott* was followed; but in the last case (*Hume v. Richardson*), the Court gave the tenant for life the income of so much 3 per cent. Consolidated Bank Annuities as would have been purchased had the conversion been made at the *testator's death*, and not at the *expiration of one year from the testator's death*. In *Allhusen v. Whittell*, 4 L. R. Eq. 295, V. C. Wood considered the true principle to be, to ascertain what part of the testator's estate (including the income of such part during the first year from the testator's death) was required for the payment of funeral and testamentary expenses,

(ε) **Case of ultra income, but without risk.**—Where the nonconversion is attended with any risk to the property, as in the case of bonds, &c., the *remainderman*, whose interest is thus imperilled, has a right to share in the extra profit of the annual produce (b); but suppose *land* to have yielded a rental beyond what would have been the annual produce of the purchase-money, and there has been no depreciation, can the remainderman call back the extra rent received by the tenant for life, or as the remainderman gets all that was ever intended for him, viz. the undepreciated property, may the tenant for life keep the full rent? If not, then, conversely, if the land yield no annual fruit, or less than what the purchase-money would yield, the tenant for life

[*304] *should have a claim against the remainderman (a).

But if the tenant for life be also a *trustee* for sale, and neglect to sell, he cannot be allowed to put into his own pocket the higher annual produce which has arisen from his own laches, for no trustee can derive a profit from the exercise of his own office (b).

(ς) **Gibson v. Bott.**—In *Gibson v. Bott* (c), leaseholds from a defect of title *could not be sold*, and the Court gave the tenant for life interest at 4 per cent. from the death of the testator on the value. It does not appear from the report at *what time* the value was to be taken, but according to recent cases it should have been ascertained at the expiration of one year from the testator's death (d).

(ζ) **Capital coming in by instalments.**—If the testator's estate comprise funds not immediately convertible, but *receivable by instalments*, such as the testator's share in a part-

debts, and legacies, and to give the tenant for life the income of the residue from the testator's death, any part not in a proper state of investment to be taken as invested in Consols at the death of the testator.

(b) *Dimes v. Scott*, 4 Russ. 195. But see *Stroud v. Gwyer*, 28 Beav. 180, which M. R. distinguished from *Dimes v. Scott*, on the ground that in the latter the irregular investment existed at the death of the testator, but in *Stroud v. Gwyer*, the irregular

investment had been made by the trustees. This appears to be a somewhat thin distinction, [and has been doubted in a recent case, *Re Hill*, 50 L. J. N. S. Ch. 551.]

(a) See *Yates v. Yates*, 28 Beav. 637.

(b) See *Wightwick v. Lord*, 6 H. L. Cas. 217.

(c) 7 Ves. 89.

(d) See *Caldecott v. Caldecott*, 1 Y. & C. C. C. 312, 737; *Sutherland v. Cooke*, 1 Coll. 503.

nership assessed at a certain sum and payable by instalments, carrying interest at 5 per cent., the tenant for life is allowed 4 per cent. from the *death of the testator* on the value taken at the *expiration of one year* from the testator's death (*e*).

(*η*) **Discretion expressly given by the testator.**—If it appear from the terms of the will that the testator intended to give his trustees a *discretion* as to the time of conversion, which discretion has been fairly exercised, and that the tenant for life was to have the actual income until conversion, the case must be governed by the testator's intention, and not by the general rule (*f*). But if the power be so expressed as to negative the intention of varying by its exercise the rights of the parties, the general rule will prevail (*g*).

[11. **Trade profits.**—If the trust estate is improperly employed in trade, and large profits accrue, the tenant for life is only entitled to interest at 4 per cent. on the amount of capital so employed, and the rest of the profits must be added to the capital; but if the income is allowed to remain in the business and thereby conduces to subsequent accretions of profits it would seem that the tenant for life is entitled to so much of these accretions as is attributable to his share of the income remaining in the business, and if necessary an enquiry will be directed to ascertain the amount (*h*).]

* 12. **Reversionary interest converted in favour of** [*305] **tenant for life.**—The principle upon which the court implies in favour of those in remainder a direction to convert wasting property (namely, that both tenant for life and remainderman were intended to share in the enjoyment of it), demands equally in favour of the *tenant for life* a conversion of *future* or *reversionary* interests (*a*). Hence if a testator entitled to a reversion expectant on lives direct a

(*e*) *Re Llewellyn's Trust*, 29 Beav. 171; *Meyer v. Simonsen*, 5 De G. & Sm. 723.

(*f*) *Mackie v. Mackie*, 5 Hare, 70; *Wrey v. Smith*, 14 Sim. 202; *Sparling v. Parker*, 9 Beav. 524; *Johnstone v. Moore*, 4 Jur. N. S. 356; *Re Sewell's Trust*, 11 L. R. Eq. 80; [*Re Chan-*

cellor, 26 Ch. D. 42;] and see *Murray v. Glasse*, 17 Jur. 816.

(*g*) *Brown v. Gellatly*, 2 L. R. Ch. App. 751; [*Porter v. Baddeley*, 5 Ch. D. 542.]

[(*h*) *Re Hill*, 50 L. J. N. S. Ch. 551.]

(*a*) *Howe v. Lord Dartmouth*, 7 Ves. 148.

conversion and investment of his personal estate, with a discretion to the trustees as to the time, and the trustees decline to sell until in event the reversion falls into possession, here had the reversion been sold at the end of one year from the testator's death, the tenant for life would have received the interest of the purchase-money, and the fund therefore, when it falls into possession, represents the capital with the interim interest, and the Court, under these circumstances [formerly gave] the tenant for life out of the capital the difference between the money [actually] received and the value of the reversion estimated at one year from the testator's death of the sum in question on the assumption of its being payable on the day, when, as afterwards happened, it actually fell into possession (*b*). [But this method of computation has since been slightly modified, and the true method seems to be, to ascertain the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, amount on the day when the reversion falls in or is realized to the sum actually received. The sum so ascertained represents the corpus, and the difference between that sum and the sum actually received is income (*c*). This method of computation applies equally to any outstanding personal estate, the conversion of which the trustees in the exercise of their discretion postpone for the benefit of the estate, and which eventually falls in, as for instance a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy (*d*).

13. **Principle applied to legacies.**—Where a reversionary interest, which was available for the payment of pecuniary legacies, was retained unsold for many years for the benefit of the estate, it was held, when the reversion fell in, that the legatees were entitled to interest on their legacies from the expiration of one year from the testator's death (*e*).]

(*b*) *Wilkinson v. Duncan*, 23 Beav. Trusts, 24 Ch. D. 643; *Wright v. Lambert*, 6 Ch. D. 649. [*d*] *Beavan v. Beavan*; *Re Earl of Chesterfield's Trusts*, *ubi sup.*]

(*c*) *Beavan v. Beavan*, 24 Ch. D. 649, n.; *Re Earl of Chesterfield's* [(*e*) *Re Blachford*, 27 Ch. D. 676.]

* SECTION IV.

[*306]

OF INVESTMENT.

1. *Of investment of trust-money.*—Where the trust-money cannot be applied, either immediately or by a short day, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust* by the *investment* of it on some proper security.¹

¹ *Investment of trust funds.*—The trustees are to conduct themselves faithfully and exercise sound discretion, not with a view to speculation but to make a disposition of the trust funds, considering the probable income as well as the safety of the investment; *Emery v. Batchelder*, 78 Me. 233; *Miller v. Congdon*, 14 Gray, 116; *Lovell v. Briggs*, 2 N. H. 219; *Van Orden v. Van Orden*, 10 Johns. 31; *Roper on Legacies*, 411. If there are any directions in the instrument creating the trust, they are to be explicitly followed, as are any rules of court or statute provisions existing in any state. In the absence of these, the trustees must exercise their best judgment in good faith. Trustees should not make investments which will take the trust property beyond the jurisdiction of the court, and ordinarily they will be held responsible for the amount, if they do it, without being especially authorized. *Ormiston v. Olcott*, 22 Hun, 270; *Ormiston v. Olcott*, 84 N. Y. 339; *Burrill v. Shiel*, 2 Barb. 457; *Rush's App.* 12 Pa. St. 375; *Amory v. Green*, 13 Allen, 413; *Pet. Baptist Church*, 51 N. H. 424; trustees should not invest trust funds in personal securities; *Clark v. Garfield*, 8 Allen, 427; *Barney v. Saunders*, 16 How. 545; *Smith v. Smith*, 4 Johns. Ch. 281; *Spear v. Spear*, 9 Rich. Eq. 184; but the rule is now modified in some states, and in *Harvard Coll. v. Amory*, 9 Pick. 446, it was declared "all that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." There an investment in stocks of a manufacturing company and of an insurance were held to be within the authority of the trustee, and that is now adhered to; *Hunt, Appt.* 141 Mass. 515; *Brown v. French*, 125 Mass. 410; *Lovell v. Minot*, 20 Pick. 116; *New England Trust Co. v. Eaton*, 140 Mass. 532; *Kinmonth v. Brigham*, 5 Allen, 270. In *Bowker v. Pierce*, 130 Mass. 262, the trustee was not held responsible for the depreciation in railroad stocks though he continued to hold them while they were falling in value, but was held responsible for depreciation in bank stock bought in his own name, in *Gilbert v. Welsch*, 75 Ind. 557; also allowed to invest in new stock of a manufacturing company; *Daland v. Williams*, 101 Mass. 571; railroad bonds are regarded as personal securities; *Allen v. Gaillard*, 1 S. C. 279; *King v. Talbot*, 50 Barb. 453; mortgage bonds of a horse railroad were not sanctioned; *Judd v. Warner*, 2 Dema. (N. Y.) 104; to invest "as they think best for the benefit of the poor" does not limit them to real estate securities; *Scott v. Marion*, 39 Ohio St. 153; the investment must secure at least a legal rate of interest; *Williams v. Williams*. 35

2. **Trustee may not invest on personal security.** — It was the opinion of Lord Northington that a trustee might be justified

N. J. Eq. 100; where a trustee is held liable for investments in personal securities, his liability ceases when the money is paid, whether the estate receives it or not; *Re Foster's Will*, 15 Hun, 387; but though a trustee may lend on personal security, yet he cannot take the loan himself; *De Jarnette v. De Jarnette*, 41 Ala. 708; and in many cases he is not allowed to use trust funds in manufacturing, and trade, any more than in speculation; *King v. Talbot*, 40 N. Y. 96; *Kyle v. Barnett*, 17 Ala. 306; *In re Thorp Daveis*, 290; *Brown v. Ricketts*, 4 Johns. Ch. 303; and an oral request by testator that trustee should continue the business does not show sufficient authority; *Raynes v. Raynes*, 54 N. H. 201; a trustee exceeding his authority must bear all the losses and account for all the profits; *Martin v. Raborn*, 42 Ala. 648; or if he see his co-trustee do it he is liable; *Bates v. Underhill*, 3 Redf. 365; a trustee, unless by special authority, should not continue a testator's business, but may do so at the request of all parties in interest without becoming liable for any losses accruing; *Poole v. Munday*, 103 Mass. 174. Courts may give directions as to investment; *Wheeler v. Perry*, 18 N. H. 307; but powers must be strictly complied with; *Foscue v. Lyon*, 55 Ala. 440; *Brown v. French*, 125 Mass. 410; *Wood v. Wood*, 5 Paige, 599; *Burrill v. Sheil*, 2 Barb. 457; *Ihmsen's App.* 43 Pa. St. 471; if it is to be an investment on good and sufficient security, it must accord with the rules and orders of the court; *Nance v. Nance*, 1 S. C. 209; *Womack v. Austin*, 1 S. C. 421; to invest at his "discretion" did not include personal securities; *Wormley v. Wormley*, 8 Wheat. 421; power to loan in bank stocks does not include government bonds; *Banister v. M'Kenzie*, 6 Munf. 447; good and sufficient securities include town loans; *McCall v. Peachy*, 3 Munf. 288; but see *Trustees v. Clay*, 2 B. Mon. 386; trustees must obey if requested to invest in a particular manner; *McIntire v. Zanesville*, 17 Ohio St. 352; and nothing will protect them from disregarding directions if there is a loss; *Spering's App.* 71 Pa. St. 11.

It has been said that the needs of the government led to the rule requiring investment in trust funds; *Brown v. Wright*, 39 Ga. 96; but the English rule has been modified in most of our states, with the exception of Pennsylvania and New York; *Worrall's App.* 41 Pa. St. 164; *Hemphill's App.* 18 Pa. St. 303; *Morris v. Wallace*, 3 Barr, 319; *Ackerman v. Emott*, 4 Barb. 626. It has been held that trustees might invest in confederate bonds prior to the downfall of the confederacy; *Watson v. Stone*, 40 Ala. 451; *Dockey v. McDowell*, 41 Ala. 476; but not afterwards; *Snelling v. McCreary*, 14 Rich. Eq. 291; if payment was received in money in common use the trustee was not responsible for the loss; *Campbell v. Miller*, 38 Ga. 304; *Brown v. Wright*, 39 Ga. 96; *Davis v. Harman*, 21 Gratt. 194; *Dixon v. McCue*, 21 Gratt. 373; *Morgan v. Otey*, 21 Gratt. 619; *Walker v. Page*, 21 Gratt. 636; *Myers v. Zetelle*, 21 Gratt. 733; *Campbell v. Campbell*, 22 Gratt. 649; *Coltrane v. Worrell*, 30 Gratt. 436; a guardian was held liable for investing in confederate bonds; *State v. Simpson*, 65 N. C. 497; *Alexander v. Summey*, 66 N. C. 578; so of a trustee; *Creighton v. Pringle*, 3 S. C. 78; *Turner v. Turner*, 36 Tex. 41; but see *Singleton v. Lowndes*, 9 S. C. 466; trustee may receive payment in money received by prudent men; *Baird v. Hall*, 67 N. C. 230; *Barker v. McAuley*, 4 Heisk. 424; if has kept the identical money may escape liability when he otherwise would not; *Saunders v. Gregory*, 3 Heisk.

in lending on personal credit. "The lending money on a note," he said, "is not a breach of trust, without other cir-

507; only the lawful money of the United States is upheld by the United States Supreme Court; *Horn v. Lockhart*, 17 Wall. 570; *McBurney v. Carson*, 99 U. S. 567. It is not culpable to leave funds invested as they were by the testator; *Miller v. Proctor*, 20 Ohio St. 444; *Bowker v. Pierce*, 130 Mass. 262; *Smith v. Smith*, 4 Johns. Ch. 283; *Murray v. Feinour*, 2 Md. Ch. 418; but see *Pray's App.* 34 Pa. St. 100; *Harvard College v. Amory*, 9 Pick. 446; if trustees invest funds in real estate, taking the title in their own name, the *cestui que trust* may elect between the real estate and the money with interest; *Eckford v. De Kay*, 6 Paige, 565; *Morton v. Adams*, 1 Strob. Eq. 72; *Roger's App.* 11 Pa. St. 36; and the mortgagee cannot enforce his mortgage; *Mathews v. Heyward*, 2 S. C. 239. A direction to invest in productive real estate was fulfilled by the purchase of a dwelling house; *Parsons v. Winslow*, 16 Mass. 368; the trust property should not be mortgaged; *Ryder v. Sisson*, 7 R. I. 341.

The trustee must invest the trust funds within a reasonable time; *Shipp v. Hettrick*, 63 N. C. 329; *Owen v. Peebles*, 42 Ala. 338; *Handly v. Snodgrass*, 9 Leigh, 484; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; a year has been held a reasonable time; *Cogswell v. Cogswell*, 2 Ed. Chan. 231; so have three months; *Barney v. Saunders*, 16 How. 643; and six months; *Manning v. Manning*, 1 Johns. Ch. 527; *Frey v. Frey*, 2 C. E. Green, 72; *Armstrong v. Walker*, 12 Gratt. 608; it depends somewhat upon the efforts made by the trustee and whether it is an investment or a reinvestment; *Witmer's App.* 87 Pa. St. 120; if a trustee does not separate a legacy from the estate he may be liable for interest; *Fowler v. Colt*, 25 N. J. Eq. 202.

A trustee should not mix trust funds with his own, but he may do so if the amount is small, in order to invest to advantage; *Graver's App.* 50 Pa. St. 189; if money is deposited in a bank in trustee's name rather than as a trust, he will be responsible for any loss in consequence; *Lukens' App.* 7 Watts & S. 48; *Royer's App.* 11 Pa. St. 36; *Perry on Trusts*, § 463, *Jacot v. Emmett*, 11 Paige, 142; *De Peyster v. Clarkson*, 2 Wend. 77; *Kerr v. Laird*, 27 Miss. 544, *Mumford v. Murray*, 6 Johns. Ch. 1; the *cestui que trust* has a claim on the trust funds on deposit in bank, and in case of mixed deposits, checks will be applied to deposits according to their priority, whether trust or individual funds, and any trust funds remaining are subject to the trust; *School v. Kirwin*, 25 Ill. 73; *Morrison v. Kinstra*, 55 Miss. 71; *Kennedy v. Strong*, 10 Johns. 289; trustees cannot call trust money employed in their business a loan to themselves; *Townend v. Townend*, 1 Giff. 201; or their firm, *Kyle v. Barnett*, 17 Ala. 306; the whole income of the fund belongs to the trust; *Hook v. Dyer*, 47 Mo. 214; if there is a mixture of funds in purchasing stocks the *cestui que trust* may select the best; *Norris's App.* 71 Pa. St. 106; trustees may take notes; *Smith v. Smith*, 4 Johns. Ch. 283; trustees should not change testator's securities unless for good reason; *Ward v. Kitchen*, 30 N. J. Eq. 31; if trustee does what is for best interest of the trust, his act may be afterwards ratified; *Gray v. Lynch*, 8 Gill. 405; where trustees exceed their authority and gain and afterwards lose, they are liable for the original fund with interest only; *Baker v. Disbrow*, 3 Redf. 348; they cannot change from real to personal estate without authority; *Quick v. Fisher*, 9 N. J. Eq. 802; the burden of proving it advantageous is on the trustee; *Washington v. Emery*, 4 Jones Eq. 32; courts will not grant a change from testator's direc-

cumstances *crassæ negligentiae*" (a). But the case from which this *dictum* is taken has been called by Lord Eldon, from the extraordinary doctrines contained in it, "a curious document in the history of trusts" (b); and certainly it is now indisputably settled that a trustee *cannot* lend on personal security (c). Lord Hardwicke said, "a promissory note is *evidence* of a debt, but no *security* for it" (d); and

- (a) *Harden v. Parsons*, 1 Eden, 148. 112; *Wilkes v. Steward*, G. Coop. 6;
 (b) *Walker v. Symonds*, 3 Sw. 62. *Clough v. Bond*, 3 M. & Cr. 496; *per*
 (c) *Adye v. Feuilliteau*, 1 Cox, 24; *Cur.*; and see *Pocock v. Reddington*,
Darke v. Martyn, 1 Beav. 525; *Holmes* 5 Ves. 799; *Collis v. Collis*, 2 Sim.
v. Dring, 2 Cox, 1; *Terry v. Terry*, 365; *Blackwood v. Borrowes*, 2 Conn.
Pr. Ch. 273; *Ryder v. Bickerston*, & *Laws*. 477; *Watts v. Girdlestone*,
 cited *Harden v. Parsons*, 1 Eden, 149, 6 Beav. 188; *Ex parte Geaves*, 8 De
 note (a), and more fully *Walker v.* G. M. & G. 291.
Symonds, 3 Sw. 80, note (a); *Vigrass* (d) *Ryder v. Bickerton*, cited
v. Binfield, 3 Mad. 62; *Walker v. Symonds*, 3 Sw. 81, note
Symonds, 3 Sw. 63; *Anon. case*, *Lofft*, (a).
492; *Keble v. Thompson*, 3 B. C. C.

tions unless all *cestuis que trust* can consent; *Deaderick v. Cantrell*, 10 Yerg. 263; *University v. Clay*, 2 B. Mon. 385; *Lamb's App.* 58 Pa. St. 142; as they are opposed to changes except for good cause shown; *Plympton v. Plympton*, 6 Allen, 178; *Murray v. Feinour*, 2 Md. Ch. 418; if trustees invest with the assent, or at the request of the *cestui que trust*, they are not liable for any loss; *Poole v. Munday*, 103 Mass. 174; *Clermontel's Est.* 12 Phila. (Pa.) 139; this is not true if the *cestui que trust* is incapable or under a disability; *Kent v. Plumb*, 57 Ga. 207; *Barton's Est.* 1 Pars. Eq. 24; except in case of a married woman, having property to her sole and separate use; *Sherman v. Parish*, 53 N. Y. 483; and acquainted with the facts and her legal rights; *Adair v. Brimmer*, 74 N. Y. 539. Taking a second mortgage as security is not *per se* evidence of negligence; *Nance v. Nance*, 1 S. C. 209; *Clark v. Railroad Co.* 58 How. Pr. 21; for rule as to measure of care required, see 6 Abb. new cases, 447; a loan by a trustee of a married woman to her husband without security is a breach of trust; *Dunn v. Dunn*, 1 S. C. 350. If the property is not in proper securities, the trustee should sell and reinvest; *Goodwin v. Howe*, 62 How. Pr. 134; the trustee is liable for receiving improper securities from his predecessor, and for want of care in investing in government bonds and real estate; *Mills v. Hoffman*, 26 Hun, 504.

The guardian *ad litem* of an infant has no authority after the object of a suit has been accomplished to act for the infant in the investment of his funds; *Dix v. Jarman*, 1 Chy. Chamb. 38; public securities do not include municipal debentures; *Ewart v. Gordon*, 13 Chy. 40; a trustee may not invest in bank stock, unless the trustee, being competent, gives his assent; *Harrison v. Harrison*, 14 Chy. 586; trustees may erect a new building if in their judgment it will be profitable; *Re Henderson's Trusts*, 23 Chy. 45; *Smith v. Smith*, 23 Chy. 114. See also *Smith v. Rowe*, 11 Chy. 411; *Wiard v. Gable*, 8 Chy. 458; *Cameron v. Bethune*, 15 Chy. 486; *Patterson v. Lailey*, 18 Chy. 13; *Baldwin v. Crawford*, 2 Chy. Chamb. 9; *Goodfellow v. Robertson*, 18 Chy. 572.

Baron Hotham observed, that "lending on personal credit for the purpose of gaining a larger interest was a species of *gaming*" (*e*); and Lord Kenyon said, that "no rule was better established than that a trustee could not lend on mere personal security, and it ought to be *rung in the ears* of every one who acted in the character of trustee" (*f*). And it will not alter the case that the money is lent on the *joint* security of *several* obligors (*g*), or to a person to whom the testator himself had been in the habit of advancing money on personal security (*h*).

3. **Investment on stock of private company.**—A trustee may not invest the trust fund in the *stock of any private company*, as *South Sea stock, &c.*, for the capital depends upon the management of the governors and directors, and is subject to losses. The *South Sea Company*, for instance, might trade away their whole capital, provided they kept within the terms of their *charter* (*a*). Nor [*307] until the Act to be presently mentioned (*b*) could a trustee invest in *Bank stock* (*c*). "*Bank stock*," said Lord Eldon, "is as safe, I trust and believe, as any Government security, but it is not Government security, and therefore this Court does not lay out or leave property in *Bank stock*; and what this Court will decree, it expects from trustees and executors" (*d*). But if a trustee or executor has by *mistake* invested in *Bank stock* instead of *Bank Annuities*, he is not liable for the actual loss in sterling value, but only for the excess of the loss beyond that which would have

(*e*) *Adye v. Feuilliteau*, 1 Cox, 25.

(*f*) *Holmes v. Dring*, 2 Cox, 1.

(*g*) *Ib.*

(*h*) *Styles v. Guy*, 1 Mac. & G. 423.

(*a*) *Trafford v. Boehm*, 3 Atk. 440; see 444. *Mills v. Mills*, 7 Sim. 501; *Adie v. Fennilletteau*, cited *Hanco v. Allen*, 2 Dick. 499, note; *Emelie v. Emelie*, 7 B. P. C. 250. The reporter speaks in the last case of *South Sea Annuities*; but no doubt the investment had been made in *South Sea stock*. In *Trafford v. Boehm* the investment had been in *South Sea stock*,

but the reporter cites the case by a similar mistake as one of investment in *South Sea Annuities*. For the difference between the two see *Trafford v. Boehm*, 3 Atk. 444. *Adie v. Fennilletteau*, or, more correctly, *Feuilliteau*, has been examined in the Registrar's Book, but the point does not appear.

(*b*) 22 & 23 Vict. c. 35, s. 32.

(*c*) *Hynes v. Redington*, 1 Jones & Lat. 589; 7 Ir. Eq. Rep. 405.

(*d*) *Howe v. Earl of Dartmouth*, 7 Ves. 150.

resulted if the investment had been made in Bank Annuities (*e*).

4. **22 & 23 Vict. c. 35.** — By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 32, trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, are authorized to invest trust funds in the stock of the Bank of England or Ireland, or on East India stock; but the Act does not apply where a particular fund is settled specifically and there is no power of varying securities (*f*). This clause was rightly held by Sir John Romilly, M. R. (*g*), (in accordance with the view taken by V. C. Kindersley, in reference to the 27th section (*h*), but in opposition to V. C. Stuart (*i*)), not to apply to trusts created by an instrument dated before the Act, but now by the Amendment Act, 23 & 24 Vict. c. 38, s. 12, the 32d section of the original Act is made retrospective.

30 & 31 Vict. c. 132. — The Court refused under this Act to sanction an investment in stock created under the India Loan Act, 22 & 23 Vict. c. 39 (*j*), but by 30 & 31 Vict.

c. 132, s. 1, the words East India Stock are to be [*308] * taken to include as well the old East India stock as "*East India stock charged on the revenues of India, and created under and by virtue of any Act of Parliament,*" passed on or after the 13th day of August, 1859 (*a*).

[**India Loan Acts.**] — The stock under the India Loan Act has been issued under the name of *India*, and not of *East India* stock, and hence a doubt has been suggested whether India stock be within the purview of 30 & 31 Vict. c. 132,

(*e*) *Hynes v. Redington*, 7 Ir. Eq. Rep. 405; 1 Jones & Lat. 589; see *post*, chap. xxx. s. 3.

(*f*) *Re Ward's Settlement*, 2 J. & H. 191; but see *contra*, *Waite v. Littlewood*, 41 L. J. N. S. Ch. 636. But in which the case before V. C. Wood was not cited.

(*g*) *Re Miles's Will*, 5 Jur. N. S. 1236.

(*h*) *Dodson v. Sammell*, 6 Jur. N. S. 137; see S. C. 1 Dr. & Sm. 575.

(*i*) *Re Rich's Trusts*, Jan. 27, 1860; and see *Page v. Bennett*, 2 Giff. 117; *Re Simson's Trusts*, 1 J. & H. 89.

(*j*) *Re Colne Valley Railway*, Johns. 528; 29 L. J. N. S. Ch. 33; *Re Simson's Trusts*, 1 J. & H. 89; *Equitable Reversionary Interest Society v. Fuller*, Ib. 382, *per Cur.*

* (*a*) The day on which the India Loan Act received the Royal Assent.

but it is conceived that the doubt is purely technical, and has no solid foundation (*b*).

[The capital stocks created under the subsequent East India Loan Acts are, by those Acts, expressly directed to be deemed to be East India stock within 22 & 23 Vict. c. 35, s. 32, unless and until Parliament shall otherwise provide (*c*).]

India Railway Stock. — *Railway stock* guaranteed by the *Indian Government* is not within the Act (*d*).

5. 23 & 24 Vict. c. 38. — By s. 10 of 23 & 24 Vict. c. 38, the Court of Chancery was empowered to issue general orders from time to time as to the investment of cash subject to its jurisdiction, either “in Three per Cent. Consolidated, or Reduced, or New Bank Annuities, or in such other stocks, funds, or securities” as the Court should think fit; and by the following section, trustees, executors, or administrators, “having power to invest their trust funds upon Government securities, or upon parliamentary stocks, funds, or securities, or any of them,” may invest “in any of the stocks, funds, or securities, in or upon which, by such general order,” cash may be invested by the Court (*e*).

6. **General order.** — A General Order, dated February 1, 1861, was issued under the powers of this Act [which order has recently been annulled by the Rules of the Supreme Court, 1883, and its place supplied, in a slightly modified form, by Order 22, Rules 17 and 18, as follows:—

R. 17. “Cash under the control of, or subject to the order of, the Court may be invested in *Bank stock*, *East India stock*, *Exchequer bills*, and *2l. 10s. per cent. Annuities*, and upon *mortgage* of freehold and copyhold estates respectively

(*b*) As to the parties to be served, see *Re Price's Estate*, W. N. 1872, p. 159.

[(*c*) See 32 & 33 Vict. c. 106, s. 16; 36 Vict. c. 32, s. 16; 37 Vict. c. 3, s. 17; 40 & 41 Vict. c. 51, s. 18; 42 & 43 Vict. c. 60, s. 18; 43 Vict. c. 10, s. 14.]

(*d*) *Green v. Angell*, W. N. 1867, p. 306.

[(*e*) In this section the power is a general one, without the exception contained in 22 & 23 Vict. c. 35, s. 32, and it will not be overruled by an express direction in the instrument creating the trust that the investments are to be confined to those enumerated therein. *In re Wedderburn's Trusts*, 9 Ch. D. 112.]

in *England and Wales*, as well as in *Consolidated, Reduced, and New 3l. per cent. Annuities*."

[*309] * R. 18. "Every application for the purpose of the conversion of any stocks, funds, or securities into any other stocks, funds, or securities authorized by the last preceding rule, shall be served upon the trustees thereof if any, and upon such other persons if any as the Court or judge shall think fit."

7. **Meaning of East India Stock.** — It was at one time considered that the East India stock referred to in the Order of 1st February, 1861, was the old East India stock (*i.e.*, the capital stock of the East India Company), as the new loan had not then acquired the distinctive name of East India stock. But in a recent case in the Court of Appeal, the late M. R. stated that it had always been held that new East India stock was within the *intention* of the General Order, and it was held that new 3l. 10s. per cent. East India stock created under the powers of 42 & 43 Vict. c. 60, was within the order (*a*).

The old East India stock has now been redeemed or commuted, and has ceased to exist (*b*), and the loans under the several East India Loan Acts are now known as East India stock, and the recent order clearly includes the stocks created under those Acts.]

8. **Applications under the Act.** — Upon application under the Order of 1st February, 1861, the Court at first sanctioned investments in East India stock (*c*) upon the petition of the tenant for life, even though the market price of investment exceeded, as it commonly did, the fixed rate at which the stock would be redeemable in 1874,¹ viz. 200l. per cent. (*d*).

[(*a*) *Ex parte* St. John Baptist College, Oxford, 22 Ch. D. 93.]

(*b*) See 36 Vict. c. 17, which provided for the redemption or commutation of the stock on or before 30 April, 1874.

(*c*) That is the old East India stock, technically known by that name; *Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 382; *Colne Valley and Halstead*

Railway Company, 1 De G. F. & J. 53; *Re Fromow's Estate*, 8 W. R. 272.

(*d*) *Bishop v. Bishop*, 9 W. R. 549; *Cohen v. Waley*, 7 Jur. N. S. 937; *Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 379. This cause was heard on appeal before L. J. on 17th July, 1861, when L. J. Knight Bruce thought the order should be sustained on special grounds, so that any expression of opinion by L. J.

But in a subsequent case Lord Chancellor Campbell and the Lords Justices upon appeal concurred in refusing the application, on the ground that it would work an injury to the remainderman. Lord Campbell observed that no more precise rule could safely be laid down than "that in the absence of any special circumstances which might make the desired transfer asked by the tenant for life beneficial to those in remainder, *irrespective of pecuniary calculations*, the transfer ought not to be permitted, if *on pecuniary calculations* it might be injurious to those in remainder." And Turner, L. J., appears to * have assented to this view, [*310] giving as an instance in which the Court might properly make such investment, where "from the exigency of a family it would be desirable for the *children* that the income of the *parents* should be increased." But he added that the decision was "not intended to embarrass trustees where the fund was not in Court, and that they would, in making such an investment, be entitled to the protection of the Court if they acted *bonâ fide* to the best of their discretion" (a).

Accordingly where trustees were directed to invest in the public stocks or funds, and they retained English and Irish Bank stock and East India stock *in specie*, it was held (there being no imputation on their *bona fides*) that they had not exceeded their duty, and the tenant for life was declared to be entitled to the actual income which had arisen from those securities since the passing of the Act which authorized them, but not to the actual income which had accrued before the passing of the Act (b).

And where Bank stock stood settled upon A. for life, with remainder to his children, if any, with remainder to certain persons absolutely, and A. (who had been married twenty-seven years without issue) applied, with the consent of the ultimate remaindermen, for an investment in East India stock, M. R. said he never sanctioned such an investment

Turner became unnecessary; but both L. JJ. assented to the principle laid down in *Cockburn v. Peel*, 3 De G. F. & J. 170.

(a) *Cockburn v. Peel*, 3 De G. F. & J. 170; and see *Re Boyces Minors*,

1 Ir. R. Eq. 45; *Ungless v. Tuff*, 9 W. R. 729; *Waite v. Littlewood*, 41 L. J. N. S. Ch. 636.

(b) *Hume v. Richardson*, 4 De G. F. & J. 29.

where infants were interested, unless an increase of income was absolutely required for their maintenance; but considering the improbability of there being children in that case, he made the order (c).

In another case the tenant for life of a residue applied for the sale of Bank Annuities and the investment of the proceeds upon Bank stock, and the Court, after taking time to consider, declined to make any order, on the ground that the exercise of the power by the Court was discretionary, and that there were no special circumstances to call for such a change of investment (d).

But where a tenant for life had a wife and five children, and his income, exclusive of the dividends of the fund in Court (6357l. 15s. 2d. Consols), was only 70l. per annum, the Court thought these circumstances sufficient to justify an investment in Bank stock, and made the order accordingly (e).

So where the tenant for life was suffering from ill [*311] health and * was straitened in his circumstances, and asked for an investment of one moiety in India stock and the other moiety in Bank stock, the Court assented to the prayer, with the qualification that as investment in India stock involved a possible loss of capital, the whole fund should be invested in Bank stock (a).

So where a fund was charged with an annuity of 500l. per annum, and was insufficient for its purpose, the Court, though it would not have listened to an application with the mere view of augmenting the income of the tenant for life, directed an investment in East India stock, in order to aid the primary intention of providing for the annuity (b).

[9. Powers in Acts of Parliament. — There has been a great conflict of opinion as to whether] the powers conferred by

(c) *Montefiore v. Guedella*, W. N. 1868, p. 87. receive more than two dividends in the year.

(d) *Maclaren v. Stainton*, M. R. July 4, 1861. (a) *Re Longford's Trust*, 2 J. & H. 458; and see *Vidler v. Parrott*, 4 N. R. 392.

(e) *Peillon v. Brooking*, M. R. July 6, 1861; and see *Re Boyces Minors*, 1 Ir. R. Eq. 45; *Re Ingram's Trusts*, 11 W. R. 980, where the tenant for life by the change would (b) *Mortimer v. Picton*, 10 Jur. N. S. 83; and see *Hurd v. Hurd*, 11 W. R. 50; *Fluid v. Fluid*, 7 L. T. N. S. 590.

the Act apply to moneys paid into Court under *Acts of Parliament* directing the moneys to be invested on securities other than those mentioned in the Act under consideration; [but the question has been finally settled in favour of the application of the powers (c).]

10. **Service.**—Applications under Rule 17 of Order 22 need not be served on the trustees of the fund, but such service is necessary under Rule 18 of the same Order (d).

11. **Consent.**—Powers of investment are generally to be exercised with the *consent* of the tenant for life, and it has been doubted whether the several Acts enlarging the power of trustees apply where such consent is required. It is conceived, however, that the effect of the Acts is to authorise trustees to invest on the extended securities, provided the investments be accompanied with all the conditions required for investment upon the securities specified in the settlement. Any other construction would be a trap, into which many trustees must already have fallen.

[12. **Settled Land Act.**—By the combined operation of sects. 21 and 32 of the Settled Land Act, 1882, all moneys in Court which are liable to be laid *out in [*312] the purchase of land to be made subject to a settlement may be “invested on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten

(c) [*Ex parte* St. John Baptist College, Oxford, 22 Ch. D. 93; see] *Re* Birmingham Bluecoat School, 1 L. R. Eq. 632; *Re* Wilkinson's Settled Estate, 9 L. R. Eq. 343; *Re* Cook's Settled Estate, 12 L. R. Eq. 12; *Re* Thorold's Settled Estate, 14 L. R. Eq. 31; *Reading v. Hamilton*, W. N. 1872, p. 91; *Re* Taddy's Settled Estates, 16 L. R. Eq. 532; [*Re* Fryer's Settlement, 20 L. R. Eq. 468; *Re* Foy's

Trusts, 23 W. R. 744; *Re* Southwold Railway Company's Bill, 1 Ch. D. 697; *Jackson v. Tyas*, 52 L. J. N. S. 830; *Secus*,] *Re* Shaw's Settled Estates, 14 L. R. Eq. 9; *Re* Boyd's Settled Estate, 21 W. R. 667; *Re* Vicar of St. Mary, Wigton, 18 Ch. D. 646; *Ex parte* Rector of Kirke-meaton, 20 Ch. D. 203.]

(d) *Re* Adams's Will, W. N. 1868, p. 58; 17 L. T. N. S. 641.

years next before the date of investment paid a dividend on its ordinary stock or shares."

Under this section, moneys in Court which have arisen from the purchase under the Lands Clauses Consolidation Act, 1845, of land belonging absolutely to a charity, have been invested in railway debenture stock (*a*).

13. Where under a will money was bequeathed to trustees in trust to lay it out in the purchase of real estate, to be settled in strict settlement, with a direction that until the purchase "the legacy should be invested in Government or real securities, but not in any other mode of investment," it was held that the trustees, on the direction of the tenant for life, might invest the legacy in debenture stock (*b*).]

14. **Investments on mortgage.** — With respect to investments upon *mortgage* Lord Harcourt said, "The case of an executor's laying out money without the indemnity of a decree, if it were on a *real security and one that there was no ground at the time to suspect*, had not been settled: but it was his opinion that the executor, under such circumstances, was not liable to account for the loss" (*c*). And Lord Hardwicke (*d*), and Lord Alvanley (*e*), appear likewise to have held that a trustee or executor would be justified in laying out the trust-fund upon well-secured *real estates*. But Lord Thurlow, upon application made to him to lay out on mortgage money belonging to a lunatic, observed, that "in *latter* times the Court had considered it as improper to invest any part of a lunatic's estate upon *private security*" (*f*). And Sir John Leach refused a similar application with reference to the money of infants, at the same time expressing his surprise that any precedent could have been produced to the contrary (*g*). Where there was no power of investing

[(*a*) *Re Byron's Charity*, 23 Ch. D. 171.]

[(*b*) *Re Mackenzie's Trusts*, 23 Ch. D. 750.]

(*c*) *Brown v. Litton*, 1 P. W. 141; and see *Lyse v. Kingdon*, 1 Coll. 188.

(*d*) *Knight v. Earl of Plymouth*, 1 Dick. 126.

(*e*) *Pocock v. Reddington*, 5 Ves. 800.

(*f*) *Ex parte Cathorpe*, 1 Cox, 182; *Ex parte Ellice*, Jac. 234.

(*g*) *Norbury v. Norbury*, 4 Mad. 191; and see *Widdowson v. Duck*, 2 Mer. 494; *Ex parte Ellice*, Jac. 234; *Ex parte Fust*, 1 C. P. Cooper T. Cott. 157, note (*e*); *Ex parte*

on mortgage, and the trustees intending to invest on government * securities, afterwards, *at the instance* [*318] *of the tenant for life*, and to procure a higher rate of interest, invested on mortgages which proved deficient, they were held to be liable for the difference to the *cestui que trust* in remainder. The ground of the decision, however, was, that the trustees had consulted the benefit of the tenant for life at the expense of the remainderman, and the Court gave no opinion upon the dry question, whether trustees without a power could safely invest on mortgage, but did not encourage the idea that they could (*a*). Trustees, until the recent Acts, were certainly not justified in lending upon mortgage, when by the terms of their instrument of trust they were expressly directed to invest in the *funds* (*b*).

Late Acts. — Scotland. — Now by 22 & 23 Vict. c. 35, s. 32 (*c*), “when a trustee, executor, or administrator, shall not by some instrument creating his trust be expressly forbidden to invest any trust fund on *real securities in any part of the United Kingdom*,” he is at liberty to make such investment, provided it be in other respects reasonable and proper. Under this enactment, therefore, trustees may now lend on real security in *England* or *Wales*, or *Ireland*, but not in the *Isle of Man*, and as the Act by the last section is not to extend to *Scotland*, and as the Scotch real property law is quite different from the English, trustees could not be advised to lend money on real security in *Scotland* (*d*).

Mortmain. — Also by 23 & 24 Vict. c. 38, s. 11, and the general order before mentioned, trustees having power to invest on Government or Parliamentary securities may now invest on real securities in *England* or *Wales*, and such investments may be made by corporations and trustees holding moneys in trust for any public or charitable purpose notwithstanding the statutes of mortmain (*e*).

Franklyn, 1 De G. & Sm. 531; Barry v. Marriott, 2 De G. & Sm. 491; *Ex parte* Johnson, 1 Moll. 128; *Ex parte* Ridgway, 1 Hog. 309.

(*a*) Raby v. Ridehalgh, 7 De G. M. & G. 104.

(*b*) Pride v. Fooks, 2 Beav. 430;

Waring v. Waring, 3 Ir. Ch. Rep. 331.

(*c*) Made retrospective by 23 & 24 Vict. c. 38, s. 12.

(*d*) See *Re Miles's Will*, 5 Jur. N. S. 1236.

(*e*) 33 & 34 Vict. c. 34.

Investments by the Court. — Previously to these Acts the Court had, even where an express power existed to lend on real security, refused to exercise it by sanctioning a loan on mortgage, on the ground that in ninety-nine cases out of a hundred the expense of the mortgage more than counter-balanced the increase of income (*f*). But the rule has since been relaxed (*g*).

[*314] *15. **Where no express power, trustees may invest in Three per Cent. Consols.** — In the absence of express powers created by the settlement and irrespective of powers conferred by statute, trustees, executors, or administrators have always been held justified in investing in one of the *Government* or *Bank Annuities*; for here, as the directors have no concern with the principal, but merely superintend the payment of the dividends and interest till such time as the Government may pay off the capital, it is not in their power, by mismanagement or speculation, to hazard the property of the shareholder (*a*). It should be observed that all *public* annuities are not necessarily *Government* annuities (*b*); and of the Government or Bank Annuities, the one which the Court thought proper to adopt was the *Three per Cent. Consolidated Bank Annuities*, the fund which at the time when the rule of the Court was established was considered from its low rate of interest the least likely to be determined by redemption (*c*). If a trustee, who has money in hand which he ought to render productive, invest it on this security, he has done his duty, and will not be answerable for any subsequent depreciation (*d*).

(*f*) *Barry v. Marriott*, 2 De G. & Sm. 491; and see *Ex parte Franklyn*, 1 De G. & Sm. 531.

(*g*) See *Ungless v. Tuff*, 9 W. R. 729.

(*a*) *Trafford v. Boehm*, 3 Atk. 444, *per* Lord Hardwicke.

(*b*) *Sampayo v. Gould*, 12 Sim. 435.

(*c*) See *Howe v. Earl of Dartmouth*, 7 Ves. 151. In reference to the New Three per Cent. Annuities (formerly Three and a Quarter per Cent.), it is to be observed that,

though specially exempted from further reduction until 1874, which the Three per Cent. Consols were not, the latter are protected by a legislative provision requiring a year's notice to be given before redemption.

(*d*) *Ex parte Champion*, cited *Franklin v. Frith*, 3 B. C. C. 434; *Powell v. Evans*, 5 Ves. 841, and *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Knight v. Earl of Plymouth*, 1 Dick. 126, *per* Lord Hardwicke; *Peat v. Crane*, cited *Hancom v. Allen*, 2 Dick. 499, note; *Clough v. Bond*, 3

16. **Investment on other stock ordered under particular circumstances.** — The Court [would, however, even before the recent Acts already referred to], under *special* circumstances [have invested] in other Government Stock than Consols. Thus, a testator gave his residuary estate to executors upon trust to pay the annual produce to A. for life in equal portions at *Lady-day* and *Michaelmas-day*, and after his decease in trust for other purposes. A motion was made that the executors might invest a sum in their hands in the Three per Cent. Consolidated Bank Annuities, but it was objected that the dividends of this stock were payable in January and July; whereas, if the money were laid out in the *Three per Cent. Reduced Annuities*, the dividends would be payable at the time directed by the testator; and Sir John Leach made the order accordingly (e).

* 17. **Whether trustees may invest on any other** [*315] **Government security.** — In the report of *Hancom v.*

Allen (a) it is said, "The trust money had been laid out by the trustees in *funds* which sunk in their value, without any *mala fides*; but the same not being laid out in *the fund* in which the Court directs trust money to be laid out, the trustees were ordered to account for the principal and pay it into the Bank, and then that it should be laid out in *Bank Three per Cent. Annuities*." It might be inferred from this statement, that, if a trustee before the late Acts had invested in any other Government Security than the Three per Cent. Consols, the Court would have held him accountable for any loss by a fall of the stock; but such a doctrine would have been extremely severe against trustees (b), and the case, as extracted from the Registrar's book, is no authority for any such proposition. *Thomas Phillips*, a trustee of 1500*l.*, instead of investing the money in a purchase of land and in the mean time on some sufficient security, as required by the

M. & Cr. 496, per Lord Cottenham;
Holland v. Hughes, 16 Ves. 114, per
 Sir W. Grant; *Moyle v. Moyle*, 2 R.
 & M. 716, per Lord Brougham; and
 see *Jackson v. Jackson*, 1 Atk. 518.

(e) *Caldecott v. Caldecott*, 4 Mad.
 189.

(a) 2 Dick. 498.

(b) See *Angell v. Dawson*, 3 Y. &
 C. 316; *Ex parte Projected Railway*,
 11 Jur. 160; *Matthews v. Brise*, 6
 Beav. 239; *Baud v. Fardell*, 7 De G.
 M. & G. 628.

trust, had advanced it to his brother, John Phillips, a banker, without taking any other precaution than accepting a simple acknowledgment of the loan. John Phillips continued to pay interest upon the money for some time, but eventually became insolvent, and the fund was lost. The Court, under these circumstances, called upon the trustee to make good the amount. The decision was reversed in the House of Lords, probably on the ground of the plaintiff's acquiescence (c).

Late Acts. — By 23 & 24 Vict. c. 38, s. 11, and the general order before referred to, trustees having power to invest in Government or Parliamentary Securities are now expressly authorised to invest not only in Consols, but also in *Three per Cent. Reduced Bank Annuities* and *New Three per Cent. Bank Annuities*.

18. **23 & 24 Vict. c. 145.** — By a later Act of the same session (d), trustees under an instrument dated *since 28th August, 1860*, and having money in their hands which it was their duty to invest at interest, might invest the same in *any* of the Parliamentary stocks or public funds, or in Government securities, *with power of variation*, but no investment except in Consols was to be made without [such consent as therein mentioned. But this section was rarely acted upon, and has since been repealed (e).]

19. **30 & 31 Vict. c. 132, s. 2.** — By another Act (f) [*316] it is enacted, that "it shall be lawful for *any trustee, executor, or administrator to invest any trust fund in his possession or under his control in *any securities*, the *interest* of which is or shall be *guaranteed by Parliament*."

20. **Metropolitan Board of Works stock.** — By another Act (a) a trustee, executor, or other person empowered to invest money in public stocks or funds, or other Government securities, may, unless forbidden by the will or other instrument under which he acts, whether prior in date to the Act or not, invest the same in consolidated stock created by the *Metropolitan Board of Works*.

(c) *Allen v. Hancorn*, 7 B. P. C. 375.

(d) 23 & 24 Vict. c. 145, s. 25.

[(e) 44 & 45 Vict. c. 41, s. 71.]

(f) 30 & 31 Vict. c. 132, s. 2.

(a) 34 & 35 Vict. c. 47, s. 13.

[21. **Indian Railway annuities.** — By the East Indian Railway Company Purchase Act, 1879 (*b*), certain annuities were authorized to be created for the purpose of carrying out the terms which had been agreed upon between the Secretary of State for India and the Railway Company, and by sect. 37 any trustee having power under the instrument constituting his trust to invest the trust funds in the shares or stock of any Indian railway the interest on which is guaranteed by the Secretary of the State, may invest such trust funds in the purchase of annuities of Class B. thereby authorized to be created." Under this section the Court has, upon the application of a tenant for life, sanctioned the conversion into annuities of Class B. of Bank Annuities in Court (*c*).

22. **Church trustees.** — Church trustees incorporated under the Compulsory Church Rate Abolition Act, 1868, are by that Act empowered to invest any funds in their hands in Government or real securities (*d*).]

23. **Trustee, if expressly empowered, may lend on personal security.** — A trustee may lend even on *personal* security, where he is *expressly empowered* to do so by the instrument creating the trust (*e*). But no such authority is communicated by a direction to place out the money at interest *at the trustee's discretion* (*f*), or *on such good security as the trustee can procure, and may think safe* (*g*). And if joint trustees be empowered to lend on personal security, they *may not lend to one of themselves*, for the settlor must be taken to rely upon the united vigilance of *all* the trustees with respect to the solvency of the *borrower* (*h*): and trustees having a power, with the *consent of the tenant for life*, to lend on * personal security, cannot lend on personal secu- [*317]

[*b*] 42 & 43 Vict. c. cclvi.]

[*c*] *Re Mansel*, 30 W. R. 133.]

[*d*] 31 & 32 Vict. c. 109, s. 9.]

(*e*) See *Forbes v. Ross*, 2 B. C. C. 430; *S. C.* 2 Cox, 113; *Paddon v. Richardson*, 7 De G. M. & G. 563.

(*f*) See *Pocock v. Reddington*, 5 Ves. 794; *Potts v. Britton*, 11 L. R. Eq. 433; *Bethell v. Abraham*, 17 L. R. Eq. 24.

(*g*) *Wilkes v. Steward*, G. Coop. 6; *Styles v. Guy*, 1 Mac. & G. 422; *Attorney-General v. Higham*, 2 Y. & C. C. C. 634; and see *Mills v. Osborne*, 7 Sim. 30; *Westover v. Chapman*, 1 Coll. 177.

(*h*) — *v. Walker*, 5 Russ. 7; and see *Stickney v. Sewell*; 1 M. & Cr. 14; *Westover v. Chapman*, 1 Coll. 177.

urity to the *tenant for life himself* (a). And when the Court has assumed the administration of the estate by the institution of a suit, it will not direct an investment on personal security, though there be a *power* to lay out on either personal or Government security, but will order all future investments to be made on Government security (b).

A power to lend on personal security may mean on the security of personal property, or the security of the personal undertaking of the borrower, and where the trustees had the last mentioned power and lent upon a note of hand, the Court allowed the loan, but directed a bond to be taken (c).

24. **Where empowered to lend on personal security, trustee may not accommodate a person.**—Where the trustees of a sum of money for A. for life, remainder for her children, were authorised by the settlement to lend the trust fund upon real or *personal security* as should be thought good and sufficient, and the trustees lent it to a person in *trade* whom A. had married, and the money was lost, they were made responsible for the amount. Sir William Grant said, “The authority did not extend to an *accommodation*: it was evident the trustees had, upon the marriage, been induced to *accommodate* the husband with the sum, which they had no power to do” (d). And in another case, where a trustee was even *required* at the request of the wife to advance money to the husband upon his bond, and the husband took the benefit of the Insolvent Act, and the wife requested the trustee to advance 80*l.* to the husband upon his bond, and the trustee refusing, the wife filed her bill to have the trustee removed, the Court said, “that so total a change had taken place in the circumstances and position of the husband, that the clause in question became no longer applicable to him

(a) *Keays v. Lane*, 3 I. R. Eq. 1. But a tenant for life whose consent is necessary to the exercise of a power of sale by trustees, may purchase from the trustees. See *post*, c. XVIII. s. 3.

(b) *Holmes v. Moore*, 2 Moll. 328.

(c) *Pickard v. Anderson*, 13 L. R. Eq. 608.

(d) *Langston v. Ollivant*, G. Coop. 33. In this case, as the person to whom the money was lent was a *trader*, it has been inferred that under a power to lend on personal security the trustee cannot lend to a *trader*, but the Court has never yet gone to that extent.

and ceased to have any effect, and the trustee had done his duty when he refused to lend the money" (e).

25. **Tenant for life not to be favoured.**—No applications from *cestuis que trust* to their trustees are so frequent as for a more productive investment for the benefit of the tenant for life. In these cases the trustees must remember that any special power which the settlement may give them was *not created for the purpose of favouring one [*318] party more than another, but for the benefit of *all*, and if they lend themselves improperly to the views of the tenant for life, at the expense of the remaindermen, they will be held personally responsible (a).

Trustees bound to protect the remaindermen.—And where trustees have the ordinary power of varying securities *with the consent of the tenant for life*, the trustees must consider the intention to be that as the control is given to the tenant for life for *his* protection, so the trustees have a particular discretion reposed in them for the protection of the *remaindermen* (b). And on the other hand where every change of investment is to be with the *consent* of the tenant for life, and he withholds his consent though the fund is in danger, the trustee can proceed in equity and compel a change of investment, against the wishes of the tenant for life (c).

26. **Consent.**—All the conditions annexed to the power must be strictly observed, as if the authority be to lend to the husband *with the consent of the wife*, the trustees cannot make the advance on their own discretion, and take the consent of the wife at a subsequent period (d). And if the consent of two trustees be required, the consent of one of them does not operate as the consent of both (e). And where the consent of a married woman was necessary to authorise an investment with the sanction of the Court, a *petition* by the

(e) *Boss v. Godsall*, 1 Y. & C. C. 617; and see *Luther v. Bianconi*, 10 Ir. Ch. Rep. 194; *Costello v. O'Rorke*, 3 I. R. Eq. 172. Compare cases at p. 328, note (c), *infra*.

(a) *Raby v. Ridehalgh*, 7 De G. M. & G. 104; and see *Stuart v. Stuart*, 3 Beav. 430; *Fitzgerald v. Fitzgerald*,

6 Ir. Ch. Rep. 145; *Vickery v. Evans*, 8 N. R. 286.

(b) See *Harrison v. Thexton*, 4 Jur. N. S. 550.

(c) *Costello v. O'Rorke*, 3 I. R. Eq. 172.

(d) *Bateman v. Davis*, 3 Mad. 98.

(e) *Greenham v. Gibbeson*, 10 Bing. 363.

husband and wife praying for such investment was no consent by the wife, for the petition was regarded as that of the husband only (*f*), nor will a married woman be deemed to have consented to an investment by joining in a deed of appointment of new trustees, in which such an investment is recited or noticed, for the deed is executed *alio intuitu* (*g*). Where the consent of two trustees is not required to be by deed, one may consent by deed and the other by parol (*h*). Where the nature and object of the power and the circumstances of the case point to a *previous* or *contemporaneous* consent, then such previous or contemporaneous consent is necessary although not *expressly* required by the [*319] terms * of the power (*a*). If for instance, a consent be required for the substitution of one estate for another, the consent must precede or at all events accompany the execution of the power, for the question must be determined by the relative values of the two estates, at the time of substitution (*b*). But if an investment has been made without the required consent, a *cestui que trust* cannot complain of it, who, being *sui juris* at the time, has acquiesced in and adopted the investment (*c*).

27. *Investment in trade.*—A power to “invest at the discretion of the trustees” will not authorise an investment on the securities of the *United States*, or of the railway companies in that country (*d*), and a power “to place out at interest, or other way of *improvement*,” will not authorise an investment of the money in any trading concern (*e*); or in fact any investment but a Government or real or other

(*f*) *Norris v. Wright*, 14 Beav. 291, see 303. [But now, by 45 & 46 Vict. c. 75, and Rules of the Supreme Court, Order 16, Rule 16, a married woman petitions without a next friend, and a petition by husband and wife is not necessarily regarded as the petition of the husband only; and such a petition would, it is conceived, if presented under the wife's instructions, operate as a consent by her.]

(*g*) *Wiles v. Gresham*, 2 Drew. 258, see 267.

(*h*) *Offen v. Harman*, 1 De G. F. & J. 253.

(*a*) *Greenham v. Gibbeson*, 10 Bing. 374, *per* Tindal, C. J.

(*b*) *Greenham v. Gibbeson*, 10 Bing. 363.

(*c*) *Stevens v. Robertson*, 37 L. J. N. S. Ch. 499.

(*d*) *Bethell v. Abraham*, 17 L. R. Eq. 24.

(*e*) *Cock v. Goodfellow*, 10 Mod. 489.

unobjectionable security (*f*); but it has been held that a direction not to "invest" but to "employ" the money, savours of a trading concern (*g*); but the distinction appears too thin to be relied upon with safety.

28. *Loan by way of annuity.* — Upon a marriage the wife's portion was settled upon the intended husband and wife for their respective lives, with remainder to the issue, and a power was given to the trustees to "call in and lay out the money at greater interest if they could." The trustees sold out stock to the amount of 400*l.*, and laid it out in the purchase of an *annuity* for one life, and *insured* the life, and Lord Manners said the purchase of the annuity was not a proper disposition of a trust fund settled as this was (*h*).

29. *Loans upon shares of companies.* — A power to invest "upon *security* of the funds of any company incorporated by Act of Parliament," will not authorise an investment in "Great Northern Preference *shares*," which are not a security upon the property of the company, but a participation in the partnership (*i*).

30. *Debentures.* — A power to lend on the *debentures* of a public company did not; it is conceived, authorise an investment on debenture *stock*, for the settlor in allowing debentures relied on the liability of the company to pay the capital; but in debenture stock the dividend only can be recovered, and there are no means of realizing the capital but by transfer, and the value in the market may have greatly *sunk. Debenture bonds are a tempo- [*320] rary loan, but debenture stock is perpetual.

34 Vict. c. 27. — But by 34 Vict. c. 27, (29 June, 1871), it was enacted that where power had been before the passing of the Act or should at any time thereafter be given to trustees to invest in the mortgages or bonds of a railway or other company, such power should, unless the contrary be expressed in the instrument, be deemed to include a power to invest in the *debenture stock* of a railway or other com-

(*f*) *Dickinson v. Player*, C. P. Cooper's Cases, 1887-8, 178.

(*g*) S. C.

(*h*) *Fitzgerald v. Pringle*, 2 Moll. 534.

(*i*) *Harris v. Harris*, No. 1, 29 Beav. 107.

pany, and an investment in debenture stock may now be made accordingly.

[31. **Local Loans Act.** — By “The Local Loans Act, 1875,” 38 & 39 Vict. c. 83, s. 27, trustees or other persons for the time being authorised or directed to invest in the debentures or debenture stock of any railway or other company, unless the contrary is expressed in the instrument, are empowered to invest in any nominal debentures or nominal debenture stock issued under the Act. And a similar power is frequently given by Local Acts to invest in corporation and county stocks issued thereunder, but a proviso is sometimes added to prevent the investment in redeemable stock from being made at a price exceeding its redemption value.]

32. **Terminable securities.** — And where a fund is settled upon trust for one for life with remainders over, a power to “invest upon Government real or personal security, or in such stocks, funds, or shares, as the trustees in their *absolute discretion may think fit*,” will not authorise a purchase of ordinary consolidated stock, or of preference or guaranteed stock of a *terminable character* (a).

33. **Direction to retain investments.** — If a testator direct his “personal estate invested in Government or *other securities in bonds or shares* of whatever nature or kind, to be held in the same or the like investments,” the executors are justified in retaining in specie Victoria bonds, Brazilian and Russian bonds, and English and Indian Railway stock, and East India stock (b). If shares in a banking company are given to trustees “upon trust to permit them to remain in their then state of investment,” but the Company is reconstituted, and the shares which were originally fully paid up with unlimited liability are converted into shares of limited liability but with a margin of uncalled capital, the authority to retain the shares is exhausted, as they have ceased to be in the same estate of investment.¹

34. **Shares which must stand in one name only.** — If a trust fund be given to *three* trustees, with power to sell out and

(a) *Stewart v. Sanderson*, 10 L. R. Eq. 26.

(b) *Arnould v. Grinstead*, W. N. 1872, p. 216; 21 W. R. 155.

¹ *Re Morris*, 54 L. J. N. S. Ch. 388.

invest in the shares of a company, the trustees may not sell out and invest in the shares of a company which requires the shares to be held by a *single person*. But if shares in such a company be specifically bequeathed to three trustees, they are justified from the nature of the case in taking the shares in the name of *one* of themselves (c).

35. **Exchequer bills.**—Where monies paid into Court were directed by an Act to be invested in “Three per cent. Consols, or Three per cent. *Reduced, or *any Government securities*,” the Court refused to allow an investment on Exchequer bills as not within the meaning of the Act (a); but where a trustee had engaged to lend a sum upon mortgage, which was authorised by the powers of the will, and instead of leaving the money idle at his bankers’, laid it out in Exchequer bills as a temporary investment, and productive of interest with little fluctuation of value during the interval while the mortgage was in preparation, the Court held that such a dealing with the funds was justifiable (b); and it has since been ruled that Exchequer bills do fall within the description of Government securities (c); and they are now expressly authorised as an investment by 23 & 24 Vict. c. 38, s. 11, and the general order before mentioned.

36. **Foreign securities.**—Stock of the United States, and even the bonds and debentures of the particular states, come under the description of “*foreign funds*,” but not so the bonds or debentures of municipal towns or railway companies abroad (d). [And where a power was given to trustees to invest “upon any of the stocks or funds of the Govern-

(c) *Consterdine v. Consterdine*, 31 Beav. 330; and see *Mendes v. Guedalla*, 2 J. & H. 259; [*Lewis v. Nobbs*, 8 Ch. D. 591.]

(a) *Ex parte Chaplin*, 3 Y. & C. 397.

(b) *Matthews v. Brise*, 6 Beav. 239. But the trustee having left the Exchequer bills in the hands of the broker for more than a year, and without being earmarked, and the broker hav-

ing disposed of the Exchequer bills for his own purposes, and become bankrupt, the trustee was, on *that ground*, made responsible for the value of the bills at the date of the bankruptcy, with four per cent. interest.

(c) *Ex parte South Eastern Railway Company*, 9 Jur. 650.

(d) *Ellis v. Eden*, 23 Beav. 543; *Re Langdale's Settlement Trust*, 10 L. R. Eq. 39.

ment of the United States of America or of the Government of France, or *any other Foreign Government*," it was held that investments in New York and Ohio stocks and Georgia bonds were authorized by the power (e).] And where trustees were empowered to "continue or change securities from time to time, *as to the majority should seem meet*," and they proposed to call in certain securities and invest in American Government and American railway securities, the Court in an administration suit would not allow the trustees to exercise their discretion in this way, though great part of the testator's own estate was left by him thus invested (f). [But where a testator gave all his residue to trustees upon trust to invest in the parliamentary stocks or funds, or upon real securities, and the will contained a proviso authorising the trustees, as often as they should think it expedient so to do, to sell out, transfer or otherwise vary the trust moneys, funds, and securities, and to invest the same in or [*322] on *any other funds or securities whatsoever*, it was held that the trustees were acting within their powers in selling out New Three per cent. annuities, and investing the proceeds in Russian Railway bonds and Egyptian bonds (a).

37. **Indian railways.**—The Court has even in an administration action sanctioned the conversion of Bank Annuities into East India Railway stock annuity B, and into Scinde, Punjaub and Delhi, Railway 5l. per cent. guaranteed stock, where the will authorised an investment in the guaranteed stock of any Railway Company in India, notwithstanding that the Scinde, Punjaub and Delhi, Railway was like most of the Indian Railways held only on a lease under Government (b).

38. **Shares in companies.**—However large the power of investment may be it is the duty of the trustees to exercise their discretion as to the choice of investment, and they should before investing in the shares of a company have

[(e) *Cadett v. Earle*, 5 Ch. D. 710.]

(f) *Bethell v. Abraham*, 17 L. R.

Eq. 24.

[(a) *Lewis v. Nobbs*, 8 Ch. D.

591.]

[(b) *Re Mansel*, 30 W. R. 133.

See 42 & 43 Vict. c. c cvi. s. 37.]

regard to its constitution and its rights against its shareholders (c).]

39. **Greek bonds.** — Where a testator directed all his property, except ready money or monies in the *funds*, to be converted, and the proceeds to be invested in Three per cent. Consols or *other Government securities in England*, it was held that Greek *bonds*, though guaranteed by this country, were not comprehended in the words "*funds*," and that they ought to be converted, though the Court disavowed any intention of saying that bonds of that description might not, in other cases, be deemed Government securities (d).

40. **Colony or foreign country.** — A power to invest on "the bonds, debentures, or other securities, or the stocks or funds of any *colony or foreign country*," will not authorize an investment upon the Preference Bonds of a *Foreign Railway Company*, though a sinking fund for paying off the capital expended, and the payment of the interest in the meantime, are guaranteed by the foreign government (e).

[41. **Colonial stock.** — By the Colonial Stock Act, 1877 (f), trustees are not to apply for or hold stock certificates payable to bearer issued under that Act, unless expressly authorised to do so by the terms of their trust.]

42. **East India stock.** — Government or Parliamentary stocks or funds are such as are managed by Parliament, or paid out of the revenues of the British Government, or at least guaranteed by it, and therefore *East India stock*, under the charter of the East India Company, as possessing none of these requisites, was never a *Government stock* (g); where trustees are empowered to invest "in such mode or modes of investment as they in their uncontrolled discretion shall think proper," they cannot be made personally liable for investments made *bonâ fide* in the purchase of bonds of a foreign government, bonds of a colonial railway company,

[(c) *New London and Brazilian Bank v. Brocklehurst*, 21 Ch. D. 302.] securities, as Italian, see *In re Brackenbury's Trusts*, 31 L. T. N. S. 79; 22 W. R. 682.

(d) *Burnie v. Getting*, 2 Coll. 324.

[(f) 40 & 41 Vict. c. 59, s. 12.]

(e) *Re Langdale's Settlement Trusts*, 10 L. R. Eq. 39. As to investments by the Court on foreign

(g) *Brown v. Brown*, 4 K. & J. 704.

or shares of a bank on which there is a further liability; but the Court, if an action is pending for the administration of the estate, will not allow such investments to be retained.¹

[*323] * 43. Trustees where there is power to vary, may sell out stock and invest on mortgage. — Trustees may be, as they generally are, *expressly* empowered to invest on *real* as well as Government security, and where this is the case, and there is a power to vary securities, the trustees may safely sell out Three per cent. Bank Annuities, and invest the proceeds on a mortgage; for, in this case, although the tenant for life may obtain a higher rate of interest, yet no injury is done to the remainderman, as the capital is a constant quantity, and on the tenant for life's death the remainderman himself will have the benefit. A notion is sometimes entertained that where the stock has become depreciated since the original purchase of it by the trustees, the trustees cannot sell out the stock and lend the money on mortgage without being answerable for the difference between the bought and the sale price. But there is no ground for this apprehension, for if the trust authorise the purchase of stock at all, the trustees cannot be wrong in dealing with it at the market price of the day. No doubt if there were a sudden fall under peculiar circumstances, the trustees should not, without good reason, sell out at the very moment of casual depreciation, but if the power be *bonâ fide* exercised, the mere fact of a depreciation below the bought price cannot *per se* constitute a breach of duty.

44. Appointment in respect of dividends upon a change of investment. — The trustees in changing the investment should have regard to the *tenant for life's interest* in the *income*. The stock, for instance, should be sold so as to make the time of accruer of the last dividend the starting point as nearly as possible for the commencement of the interest on the mortgage. However, if the sale of the stock be made on an intermediate day between two dividends, although the price may be enhanced by the near approach of

¹ *Re Brown*, 52 L. T. N. S. 853; 29 Ch. D. 889.

the dividend, it is not the practice to pay to the tenant for life the estimated amount of the current dividend out of the proceeds (a), although it was held in one case under *very special circumstances*, that the tenant for life was entitled to an apportionment (b). [And so after a purchase of stock between two dividend days the tenant for life will be entitled to the whole dividend which is declared on the dividend day subsequent to the purchase (c).]

45. **Mortgage to replace stock and pay interim dividends.** — Under the ordinary power of varying securities, a trustee would not be justified in lending a sum of stock upon a mortgage of real estate, conditioned for the replacement of the specific *stock* at a future day, and the payment of half-yearly sums equal to what * would have been [*324] the *dividends* in the mean time. For the exercise of the power must be supposed to be beneficial to the parties interested, or some of them; whereas, in this case, it is difficult to point out what possible advantage can accrue, though the dividends be paid and the stock replaced. Nothing more is secured to the trust than would have been the effect of the original investment had it remained in *statu quo*; while a Government security is changed for the risk of a private security, and perhaps some expense incurred, and all this for no purpose. In short, such an arrangement would look like an accommodation to a friend, rather than as an investment in furtherance of the trust (a).

46. **Mortgage to replace stock and pay interim interest.** — The case is not so objectionable when the stock is to be replaced, and in the mean time *interest* exceeding the dividend is to be paid on the amount produced by the sale; for here, one of the persons whose interest is to be consulted, viz., the tenant for life, does receive a benefit *in præsentia*, and the remainderman, if he outlive the tenant for life and

(a) *Scholefield v. Redfern*, 2 Dr. & Sm. 173; *Freeman v. Whitbread*, 1 L. R. Eq. 266; and see *Re Ingram's Trust*, 11 W. R. 980; *Bostock v. Blakeney*, 2 B. C. C. 654.

(b) *Lord Lonsborough v. Somerville*, 19 Beav. 295.

[(c) *Re Clarke*, 18 Ch. D. 160.]

(a) Since the above remarks were written, judicial opinions have been expressed to this effect; *Pell v. De Winton*, 2 De G. & J. 18; *Whitney v. Smith*, 4 L. R. Ch. App. 519, 521.

the mortgage continue so long, will derive the same advantage.

47. **Attention to value and title in lending on mortgage.**—When trustees propose to lend upon mortgage, their attention should be directed to two leading topics—the sufficiency of the value and the title of the borrower (*b*). If trustees accept a security without making proper inquiries as to its nature and adequacy, though it may have been previously valued by a surveyor (*c*); or if the trustees rely upon a valuation made by a surveyor employed by the mortgagor, without having a survey made by a valuer employed by themselves, they will be personally liable for any deficiency of the security (*d*); [and it has been held that the choice of the surveyor is a matter upon which the trustees are bound to exercise their own judgment, and that they cannot properly leave the nomination to their solicitor (*e*).] And it was held by Lord Romilly, M. R. that, as trustees are bound to employ competent persons as their solicitors, if, through the ignorance or negligence of their solicitor, the trustees lend money upon a bad title, they are personally responsible to the *cestuis que trust*. But the decision was appealed against, and the case was compromised [*325] with * the sanction of the Lords Justices on behalf of infants (*a*). [And where a trustee acting under the advice of his solicitor and upon a favourable report of a firm of surveyors advanced trust-money upon a security which ultimately proved insufficient he was held not liable, although the report was *ex facie* prepared upon faulty principles (*b*).]

(*b*) See *Waring v. Waring*, 3 Ir. Ch. Rep. 336.

(*c*) *Bell v. Turner*, W. N. 1874, p. 113.

(*d*) *Ingle v. Partridge* (No. 2), 34 Beav. 411; and see *Hopgood v. Parkin*, 11 L. R. Eq. 74; *Budge v. Gumow*, 7 L. R. Ch. App. 719; *Bell v. Turner*, W. N. 1874, p. 113; *Smethurst v. Hastings*, 52 L. T. N. S. 567; 33 W. R. 496; 30 Ch. D. 490.

(*e*) *Fry v. Tapson*, 51 L. T. N. S. 326; 33 W. R. 113; 28 Ch. D. 268.]

(*a*) *Hopgood v. Parkin*, 11 L. R. Eq. 74. The M. R. added, that if the mortgagor had wilfully and knowingly deceived the solicitor by assertion of what was false, or by the suppression of what was true, it might have altered the case and the liability of the trustees, *Ib.* 79 [and see *Re Speight*, 22 Ch. D. 727; 9 App. Cas. 1.]

[(*b*) *Re Pearson*, 51 L. T. N. S. 692.]

48. **Value of the security.** — Trustees cannot be advised to advance more than *two-thirds* of the actual value of the estate, if it be *freehold land* (c); and if the property consist of *freehold houses*, they should not lend so much as two-thirds (d), but (say) one-half of the actual value (e). The rule, however, of two-thirds, or one-half, is only a general one; and where trustees have lent on the security of property of less value, but have acted honestly, they have been protected by the Court, and have been allowed their costs (f). As to buildings used in *trade*, and the value of which must depend on external and uncertain circumstances, trustees would not, in general, be justified in lending so much as one-half (g). [And trustees should not lend on the security of unlet houses especially if the mortgagor is a builder (h).]

Ground rents. — A power of investment upon the security of freehold or copyhold hereditaments will authorise trustees to invest upon *freehold ground rents* reserved out of houses, and upon the question of value it will be borne in mind that the value of the houses is included, as, if the ground rents be not paid, the landlord can enter (i).

49. **Trustees may not lend on mortgage to one of themselves.** — Trustees are precluded from lending on mortgage to one of themselves, as all must exercise an impartial judgment as to the sufficiency of the security (j).

(c) *Stickney v. Sewell*, 1 M. & Cr. 8; *Norris v. Wright*, 14 Beav. 307; *Macleod v. Annesley*, 16 Beav. 600; *Ingle v. Partridge* (No. 2), 34 Beav. 411; *Roddy v. Williams*, 3 Jones & Lat. 16, *per Cur.*

(d) *Stickney v. Sewell*, *Norris v. Wright*, *ubi supra*; *Phillipson v. Gatty*, 7 Hare, 516; *Drosier v. Brereton*, 15 Beav. 221.

(e) *Stretton v. Ashmall*, 3 Drew. 12; *Macleod v. Annesley*, 16 Beav. 600; *Budge v. Gummow*, 7 L. R. Ch. App. 719; [*Hoey v. Green*, W. N. 1884, p. 236.]

(f) *Jones v. Lewis*, 3 De G. & Sm. 471. Reversed on appeal, it is believed, by Lord Truro, on Feb. 26,

1852, but on what grounds not known [*Re Godfrey*, 23 Ch. D. 483.] And see *Vickery v. Evans*, 3 N. R. 286.

(g) *Stickney v. Sewell*, 1 M. & Cr. 8; and see *Stretton v. Ashmall*, 3 Drew. 9; *Royds v. Royds*, 14 Beav. 54, cases of trade and manufacturing premises.

[(h) *Hoey v. Green*, W. N. 1884, p. 236; *Fry v. Tapson*, 51 L. T. N. S. 326; 33 W. R. 113; 28 Ch. D. 268; *Smethurst v. Hastings*, 52 L. T. N. S. 567; 33 W. R. 496; 30 Ch. D. 490.

(i) *Vickery v. Evans*, 3 N. R. 286.

(j) *Stickney v. Sewell*, *ubi supra*; and see — *v. Walker*, 5 Russ. 7; *Francis v. Francis*, 5 De G. M. & G.

[*326] *50. **Existing mortgages.**—Where trustees and executors are empowered by will to lay out money upon *real securities*, they are authorised in *continuing* it upon existing mortgages (*a*); but the trustees should first satisfy themselves as to the sufficiency of the security.

[51. Where trustees are authorised to “continue to hold” special investments, the power must, *primâ facie*, be held to apply to those trusts which are continuous, and the trustees may appropriate to a special continuous trust any of the investments which the settlor has authorised to be held (*b*).]

52. **Fowler v. Reynal.**—If trustees have a power of lending to *three* on a mortgage of their joint interest in a particular property, they cannot lend to *two* of them. Neither can the trustees lend to the *three* without taking any security at the time, though after an interval of two years they succeed in obtaining the security. It is no excuse to say that the delay in taking the security did not occasion the loss. The answer is, that the terms of the power were not complied with (*c*).

53. **Road bonds.**—Road bonds, or mortgages of tolls and toll-houses, are *real securities*, though they may not be eligible real securities; and where a testator, having road bonds, empowered his executor to *leave* any part of his assets on existing “real securities,” it was held that they were not bound to call in the road bonds, but might exercise a discretion. The Court, however, gave no opinion whether the executor would have been justified in lending trust money on road bonds as an original investment (*d*).

54. **Railway mortgages.**—It has since been determined, that a power to lend on *real securities* does not authorise a loan upon *railway* mortgages (*e*), and *â fortiori* a power to invest “upon the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments,” does not

108; *Crosskill v. Bower*, 32 Beav. 86; *Fletcher v. Green*, 33 Beav. 428.

(*a*) *Angerstein v. Martin, T. & R.* 239; *Ames v. Parkinson*, 7 Beav. 379.

[(*b*) *Fraser v. Murdoch*, 6 App. Cas. 855.]

(*c*) *Flower v. Reynal*, 3 Mac. & G. 500; 2 De G. & Sm. 749.

(*d*) *Robinson v. Robinson*, 1 De G. M. & G. 247; [*Cavendish v. Cavendish*, 24 Ch. D. 685.]

(*e*) *Mant v. Leith*, 15 Beav. 525; *Harris v. Harris* (No. 1), 29 Beav. 107.

authorise an investment on railway mortgages (*f*). And even a power to lend on "approved securities," though it will justify an investment on an ordinary mortgage, might not be held to extend to railway securities (*g*). And where trustees are empowered to lend "on such securities as they may approve," they are still bound to make inquiries, and exercise a sound discretion whether the securities are of sufficient value; and if in such a case * the trustees lend [*327] on any irregular securities, the *onus* lies on the trustees to show the sufficiency of the security (*a*).

55. **Loan upon a judgment.** — Trustees, with power to lend on *real securities*, could not lend on *personal* security with a *judgment* entered up against the borrower, [even when] by 1 & 2 Vict. c. 110, judgments were a charge on all the lands of the debtor, in the same manner as if he had, by writing under his hand, agreed to charge the same (*b*).

56. **Upon leaseholds for lives.** — Trustees having power to lend on *mortgage*, ought not to invest on security of leaseholds for *lives*, for there can be no security without resorting to a policy of insurance, and then, *quatenus* the policy, they rely upon the funds and credit of a private company (*c*). In the case of leaseholds, the lessee generally does not know the lessor's title; and where this is the case, it is an additional reason why trustees cannot accept the security. This restriction, however, does not apply to leases for lives in Ireland renewable for ever (where the power authorises an investment on real securities in Ireland); but the trustee must not advance more than one half the value of the property (*d*).

57. **Upon leaseholds for years.** — Where there is a power to lend on *mortgage* of real estates generally, there may be no

(*f*) *Mortimore v. Mortimore*, 4 De G. & J. 472.

(*g*) See *Re Simson's Trusts*, 1 J. & H. 89.

(*a*) *Stretton v. Ashmall*, 3 Drew. 9; and see *Zambaco v. Cassavetti*, 11 L. R. Eq. 439; [*New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302.]

(*b*) *Johnston v. Lloyd*, 7 Ir. Eq. Rep. 252. Decided upon the corre-

sponding enactment in the Irish Act, 3 & 4 Vict. c. 105. [As to judgments not charging lands until they have been actually delivered in execution, see 27 & 28 Vict. c. 112.]

(*c*) See *Lander v. Weston*, 3 Drew. 389; *Fitzgerald v. Fitzgerald*, 6 Ir. Ch. Rep. 145.

(*d*) *Macleod v. Annesley*, 16 Beav. 600.

objection on principle, to an investment on *long terms of years* at a peppercorn rent, which beneficially are equal to freeholds. But it remains to be decided whether technically long terms of years answer the description of real securities (e). [In a recent case (f), the late M. R., sitting in the Court of Appeal, observed — “I always understood that a leasehold security was *prima facie* an improper investment of trust money, and that it lay on the trustee to justify it. It would be justified if the leaseholds were held at a peppercorn rent for a long term, without covenants and without impeachment for waste, a mortgage of which was held by V. C. Shadwell in an unreported case to be a proper security for trust money. But in a subsequent case, in which the question did not directly arise, he expressed his opinion that, as a general rule, long terms of years do not answer the description of real securities (g).] It must not be forgotten that, until re-
 [*328] cently, where *the mortgagor was seised *in fee*, a demise for a long term of years was often thought the more convenient form of mortgage, in order that the land and the money might devolve together upon the personal representative of the mortgagee, and it is difficult to see the distinction between a mortgage for a term of years by demise and a mortgage for a term of years by assignment (a).

58. **Leaseholds with onerous covenants.** — As to *leaseholds* of short duration, and incumbered with covenants and clauses of forfeiture, without laying down the rule that a trustee would not be justified under any circumstances in lending on such a security, he would at least be treading on very delicate ground, and the *onus* would lie heavily upon him to make out the perfect propriety of the investment (b). If

(e) *Townend v. Townend*, 1 Giff. 211.

[(f) *Re Chennell*, 8 Ch. D. 507.]

[(g) *Re Boyd's Settled Estates*, 14 Ch. D. 626.]

[(a) Now, by 44 & 45 Vict. c. 41, s. 65, and 45 & 46 Vict. c. 39, s. 11, long terms of years at peppercorn rents may, in the cases provided by

the Acts, be enlarged into a fee simple, and the question discussed in the text may generally be avoided by exercising the powers so created.]

(b) See *Townend v. Townend*, 1 Giff. 201; *Wyatt v. Sharratt*, 3 Beav. 498; *Fuller v. Knight*, 6 Beav. 209; [*Re Chennell*, 8 Ch. D. 492.]

the trustees be authorised and *required*, at the instance of the tenant for life, to invest the trust fund in a *purchase* of leaseholds, they have no option if the tenant for life insist upon his right (c).

59. **Copyholds.** — There can be no objection to *copyholds* as a real security, but the trustee should of course take care that they are of adequate value, and not rely on the mere covenant to surrender, but procure an actual surrender (d).

60. **Mortgage of an undivided share or of a reversion.** — There does not appear to be any absolute objection to a loan by trustee on the security of an *undivided share* or of a *reversion*; but they must not advance more than the proper proportion (a third or a half, according to the nature of the property), of the value of the undivided share, or of the reversion as such, that is, the *present value of the future interest*, and in taking securities of this kind a full power of sale would be an essential provision.

61. **Lending on real security in Ireland.** — Where trustees are expressly authorised to lend on real securities in England, Wales, or Great Britain, they are empowered by 4 & 5 Will. 4, c. 29, to lend on real securities in *Ireland*. But the second section enacts, that all loans in which any *minor, unborn child, or person of unsound mind* is interested, shall be made by the direction of the Court of Chancery, to be obtained *in any cause, or (e) upon petition* in a summary way.

Upon an application to the Court under this Act, for the investment of a fund in Court upon an Irish security, Lord Langdale, *M. R., refused even a reference as to [*329] the propriety of such a step; for though it would be beneficial to the tenant for life as increasing the annual produce, it was not so safe a security as regarded the remaindermen, and it was the duty of trustees to act impartially for the benefit of *all parties alike* (a). And Lord Justice Knight

(c) *Cadogan v. Earl of Essex*, 2 Drew. 427; *Beauclerk v. Ashburnham*, 8 Beav. 322; see *ante*, p. 316.

(d) See *Wyatt v. Sharratt*, 3 Beav. 498.

(e) *Ex parte French*, 7 Sim. 510.

(a) *Stuart v. Stuart*, 3 Beav. 430.

Bruce, when Vice Chancellor, appears to have entertained similar views (*b*). But an order for such a mortgage was made by the Vice Chancellor of England (*c*); and again by Lord Cottenham, though his Lordship's attention was called to the case at the Rolls (*d*); and other orders have been made since (*e*).

Consent of feme covert.—Where the consent of a married woman was required by the trust, and the husband and wife presented a petition, with her concurrence, under the Act, it was held that this did not fulfil the requisition of the wife's consent to the investment; for when the husband and wife joined in any legal proceeding, it was not the act of the wife; and whenever she was to be bound, it was necessary that she should appear separately from her husband (*f*). [But now that a married woman can sue and be sued as if she were a *feme sole*, it is conceived that she may be bound without appearing separately.]

Lord St. Leonard's Act.—By 22 & 23 Vict. c. 35, s. 32 (*g*), trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, may invest the trust-fund in real securities in any part of the *United Kingdom*; and investments on real securities in Ireland may therefore now be made.

62. Securities in Scotland.—Where trustees have a power of investing upon "real securities," it is conceived that real securities in *Scotland*, where the law is wholly different, would not fall within the description; and though the above-mentioned Act of 22 & 23 Vict. c. 35, allows investments in real securities in any part of the United Kingdom, yet as by the 33d section the Act is not to extend to Scotland, it would not be safe for trustees to invest in Scotch securities, until that construction of the Act has been sanctioned by some judicial decision (*h*).

(*b*) *Re Kirkpatrick's Trusts*, 15 mortgage money should not be called
Jur. 941. in for five years.

(*c*) *Ex parte French*, 7 Sim. 510.

(*f*) *Norris v. Wright*, 14 Beav. 291.

(*d*) *Ex parte Pawlett*, 1 Ph. 570.

(*g*) Made retrospective by 23 &

(*e*) *Re Settlement of Allies and*
Ux. N. R. 24 Jan. 1857, in which the
Court sanctioned a proviso that the

24 Vict. c. 38, s. 12; see *ante* p. 313.
(*h*) See *Re Miles's Will*, 5 Jur. N.

S. 1236.

63. **Land Improvement Act.** — By the Improvement of Land Act, 1864 (*i*), trustees having a power to lend on *real* securities shall (unless the settlement * provide [*330] the contrary) have power, at their discretion, to invest their trust-money on charges under the Act or mortgages thereof. But as the provisions are apparently prospective, trustees under a settlement dated before 29 July, 1864, when the statute passed, cannot safely assume that the Act applies to their case.

64. **Second mortgages.** — Trustees cannot be advised to make advances upon a *second* mortgage, for they neither get the legal estate nor the title deeds, and they may be placed under serious difficulties by the acts of the first mortgagee. If he bring an action for foreclosure, the trustees forfeit their interest unless they redeem, which they may have no means of doing out of their own estate, and they may experience a difficulty in procuring a person to take a transfer; and if the first mortgage contain a power of sale, the mortgagee may sell the property at a great disadvantage, and the trustees cannot prevent it, unless by redemption, which may not be practicable (*a*). In addition to which it is extremely difficult to guard satisfactorily against the possible event of the mortgagor obtaining an advance upon a third mortgage without disclosing the second, and should this occur the third mortgagee might as a purchaser for value without notice get in the first mortgage, and *tack* his original mortgage to it, and squeeze out the second mortgage; or the first mortgagee or his transferee might by *consolidation* of his mortgage with a mortgage of other property of the same mortgagor, oust the trustees of their security (*b*). [But by the Conveyancing and Law of Property Act, 1881 (*c*), sect. 17, in cases of mortgages made or one of which is made

(*i*) 27 & 28 Vict. c. 114, s. 60.

(*a*) See *Norris v. Wright*, 14 Beav. 308; *Robinson v. Robinson*, 16 Jur. 256; *Drosier v. Brereton*, 15 Beav. 226; *Waring v. Waring*, 3 Ir. Ch. Rep. 337; *Lockhart v. Reilly*, 1 De G. & J. 476.

(*b*) But a third mortgagee holding a security which had no existence at

the date of the second mortgage, and taking with notice of that mortgage, cannot consolidate a first mortgage with his own third mortgage as against the second mortgagee, *Baker v. Gray*, 1 Ch. D. 491; [and see *Jennings v. Jordan*, 6 App. Cas. 698; *Harter v. Colman*, 19 Ch. D. 630.]

[*c*] 44 & 45 Vict. c. 41.]

after the 31st December, 1881, and subject to any stipulation to the contrary, the right of consolidating separate mortgages of different properties is taken away.]

But a *charge under the Improvement of Land Act, 1864*, is declared by the Act not to be deemed such an incumbrance as to preclude trustees of money, with power to invest the same in the purchase of land or on mortgage, from investing it upon land so charged, unless the terms of the trust or power expressly provide that the security to be so taken shall not be subject to any prior charge (*d*).

[*331] * 65. **Equitable mortgages.** — An investment upon a *deposit* of title deeds has this advantage over a second mortgage, that it would be difficult for the mortgagor to deal with the property in the absence of the deeds. At the same time it is possible that by some accident of fraud, the legal estate might get into the hands of a purchaser for value without notice, and if so the trustees would be ousted. Sir J. Romilly, M. R., observed, "I do not know that it has ever been determined, and I do not mean to express an opinion, that a trustee is ever justified in lending money on real security, *when he does not get the legal estate*" (*a*). [And in a recent case the late M. R. said that "it had never been decided that an investment upon equitable mortgage was unauthorised when there was a power to invest on real securities, because it had always been assumed to be the law of the Court without calling for a decision," and he acted upon that view (*b*).] There seems to be no objection to trustees investing upon a submortgage where they get the legal estate and are put in a position to exercise the powers arising under the original mortgage deed.¹

66. **Mixing trust-money in a mortgage.** — Of course trustees should not join with others in a mortgage, so as to *mix* up the trust fund with the rights of strangers; and still less could they take a joint mortgage in the name of a common trustee, for this would also be a delegation of their duty.

(*d*) 27 & 28 Vict. c. 114, s. 61.

[(*b*) *Swaffield v. Nelson*, W. N.

(*a*) *Norris v. Wright*, 14 Beav. 308; 1876, p. 255.]

and see cases cited p. 330, note (*a*).

¹ *Smethurst v. Hastings*, 52 L. T. N. S. 567; 33 W. R. 496; 30 Ch. D. 490.

67. **Powers of sale.**—Mortgagees at the present time almost invariably have powers of sale, [either expressed in the mortgage or arising under the recent Act (*c*),] but formerly it was otherwise, and trustees would no doubt be held justified in taking a transfer of an old mortgage not accompanied with a power of sale. Where, however, it is practicable, trustees should always insist on a power of sale, though the omission might not amount to a breach of trust (*d*).

68. **Caution in payment of the money.**—When trustees lend on mortgage, they should be careful not to part with the money, except on delivery of the security; for they will be liable for all the consequences if they sell out stock, and allow their solicitor or agent to receive the money on his representation that the mortgage is ready, and it afterwards turns out that the proposed security was a pure invention, and that the money has been misapplied (*e*).

69. **Clause not to call in the money.**—A power of investment does not justify trustees in admitting a clause that the mortgage shall not be called in for a certain period, *and if the interests of the *cestuis que trust* were [*332] thereby affected, the trustees would be personally responsible (*a*).

70. **In loans of trust-money, the trust kept out of sight.**—Where trust-money is lent upon *mortgage*, it is desirable to keep the trust out of sight, that when the money is paid off, the trust deed may not become an essential link in the mortgagor's title. It is usual, therefore, to insert in the mortgage deed a declaration, that the money advanced belongs to the trustees (not described in that character, but by name) on a joint account, and that the receipt of the survivors or survivor, his executors or administrators, their or his assigns, shall be a sufficient discharge (*b*); a practice which, assum-

[(*c*) Under 44 & 45 Vict. c. 41, s. 19, *et seq.*, a statutory power of sale arises under every mortgage by deed unless expressly excluded.]

(*d*) See *Farrar v. Barraclough*, 2 Sm. & G. 231.

(*e*) *Rowland v. Witherden*, 3 Mac. & G. 568; *Hanbury v. Kirkland*, 3

Sim. 265; [*Re Speight*, 22 Ch. D. 727; 9 App. Cas. 1;] and see *Broadhurst v. Balguy*, 1 Y. & C. C. C. 16.

(*a*) *Vickery v. Evans*, 3 N. R. 286.

See p. 329, note (*e*).

[(*b*) See now 44 & 45 Vict. c. 41, s. 61, which, subject to a contrary intention being expressed in the in-

ing the trust settlement to confer the power of executing the trusts and giving receipts on the survivors or survivor, his executors or administrators, their or his assigns, does not seem open to much objection, and has received the sanction of general usage. Any declaration of trust of the mortgage that may be requisite is executed by a separate deed. The trustees should, however, also execute the mortgage deed, as doubts have been entertained (though it is conceived without reason (c)) whether, if they omit to execute the declaration will bind them. By this method, should the mortgage be called in or transferred before any change of trustees occurs, no inconvenience arises (d). Upon a change of trustees, however, the difficulty of framing a transfer of the mortgage to the new trustees so as not to disclose the trust is very great. Some conveyancers, indeed, treat the difficulty as insurmountable, and disclose the trust; others recite in the transfer an actual payment of the mortgage money by the new trustees to the old, a practice open to the objection that it involves a recital absolutely contrary to fact (e).

[*333] Another and middle course frequently *adopted, is as follows: A. and B. being appointed new trustees in the room of C. and D., the recitals omit to notice the ap-

strument, makes the receipt of the survivors or survivor, or of the personal representatives of the last survivor, a complete discharge in all cases where, in a mortgage or transfer made since the 31st December, 1881, the money advanced or owing is expressed to be advanced by or owing to more persons than one out of money or as money belonging to them on a joint account, or the mortgage or transfer is made to more persons than one jointly and not in shares.]

(c) How can a person claim at the same time under and against a deed? If he claim under the mortgage at all, he must admit the declaration that the money was a joint advance. Besides the presumption (unless and until the contrary is proved) would be, that the solicitor who prepared

the deed had sufficient authority to insert the clause.

[(d) *Re Harmon and Uxbridge, &c. Railway Company*, 24 Ch. D. 720, 726.]

(e) In a note to Jarman's Bythewood, vol. 6, p. 381, it is stated that "some gentlemen introduce a declaration that the mortgagees are *trustees*, and have no beneficial interest, conceiving, and, it is apprehended, rightly, that this affirmation, which refers to no specific trust, would not render it incumbent on any person paying the mortgage to inquire into the nature of the trust." This proposition, it is conceived, cannot safely be acted upon. See on the doctrine of notice, *Jones v. Smith*, 1 Hare, 43; 1 Ph. 244; *Bridgman v. Gill*, 24 Beav. 306; *Jones v. Williams*, 24 Beav. 47.

pointment of A. and B. as new trustees, and merely state that A. and B. "have become entitled to the mortgage, and have required C. and D. to convey and assign to them." But this last method is by no means free from difficulty. The degree of inaccuracy of statement is perhaps no greater than that involved in the original joint account clause; but the absence of consideration creates embarrassment, and there seems room for contention by a future purchaser of the mortgaged estate that he has a right to know *how* A. and B. became entitled. Another mode is to recite that C. and D. are possessed of the mortgage moneys and security *in trust for A. and B.* to whom the same belong on a joint account, and who are desirous of having the same vested in them; a method affording a greater prospect of success than those previously mentioned, and on the whole perhaps to be preferred. [This mode of effecting the transfer has recently been approved, and the Court expressed an opinion that purchasers were entitled to rely on such a recital as a protection against any trusts which might affect the property (a).]

71. **Mortgage where the trust is disclosed.** — Where trust-money is secured upon a mortgage and the trust appears upon the title, the mortgagor generally requires a [statutory acknowledgment of the right to] production of the settlement for the purpose of satisfying a future purchaser that the estate has been discharged, and it is conceived that the trustee should give such [an acknowledgment.

72. **Friendly society.** — If the trustees of a friendly society lend the funds of the society on personal security not authorised by the Friendly Societies Act, 1875, the transaction is not an illegal contract upon which the trustees cannot sue, but amounts only to a breach of trust on the part of the trustees (b).]

73. **Scale must be held evenly by the trustees.** — Where *successive estates* are limited, the scale in investments should

[(a) *Re Harman and Uxbridge, &c.*
Railway Company, 24 Ch. D. 720,
726.]

[(b) *Re Coltman*, 51 L. J. N. S.
Ch. 3; 45 L. T. N. S. 392; reversing
S. C. 50 L. J. N. S. Ch. 721; 29 W.
R. 923.]

of course be held evenly as between all parties, and the tenant for life should not be allowed, by an investment on a security less safe or less permanent than the usual one, and therefore yielding to the present holder an increased rate of interest, to advance himself at the expense of the remainderman (c).

[*334] * 74. **Long Annuities, &c.**—If a testator's estate consist of Long Annuities, or other fund either not a Government security or not of the most permanent character, the Court, as we have seen, as soon as its observation is attracted to the circumstance, invariably directs a conversion of such estate into Three per cent. Bank Annuities (a); and even Four per cent. and Five per cent. Bank Annuities, while that description of stock existed, were ordered to be similarly converted (b). It follows that trustees, who must be guided by the practice of the Court, would not be justified, in the absence of a special power, in investing trust moneys settled upon several persons successively upon any securities, which, by the rule of the Court referred to, would be liable to be converted into other securities. Even where the trustees were empowered by the will to *continue* any of the testator's *Government Stocks*, it was held that they were not justified in continuing *Long Annuities* (c).

75. **Navy 5 per cents.**—However, where the trustees were directed by the will to invest on "*Government* or other *good security*," and part of the testator's estate consisted of Navy Five per cents., and the tenant for life continued to receive the dividends for more than thirty years, the Court refused to hold the trustees liable, for not having converted the Navy Five per cents. into Three per cent. Consols (d).

76. **Selling out Consols.**—Where the fund is already invested in *Consols*, it would be a clear breach of trust to sell out and invest the proceeds in an irregular fund, as, for instance, in *Long Annuities* (e).

(c) See *Raby v. Ridehalgh*, 7 De G. M. & G. 104.

(c) *Tickner v. Old*, 18 L. R. Eq. 422.

(a) See pp. 298, 300, *supra*.

(d) *Baud v. Fardell*, 7 De G. M. & G. 628.

(b) *Howe v. Earl of Dartmouth*, 7 Ves. 161, *per* Lord Eldon; *Powell v. Cleaver*, and other cases, cited *Id.* 142.

(e) *Kellaway v. Johnson*, 5 Beav. 319.

77. Where trust funds are irregularly invested, the tenant for life and the trustees may be called upon to answer the difference.—Where a tenant for life has been wrongly in possession of the dividends of a stock producing an extraordinary income, he will be accountable to the remainderman for the excess of his receipts beyond the income which he would have received had the fund been properly invested (*f*). Upon the question whether, if the tenant for life be insolvent, the trustees should be decreed to make compensation to the suffering party, Lord Eldon said, he would not state what the Court would do in such a case, for it depended on many circumstances (*g*). In the case of *Dimes v. Scott* (*h*), where the executors were *expressly directed* to convert the testator's personal estate into money, and invest the proceeds in * Government or real securities in trust [*335] for A. for life, remainder to B., and the executors for eleven years permitted A. to receive 10 per cent. interest upon an Indian loan; it was held they were chargeable with the difference between 10 per cent. interest which they had wrongfully paid, and the interest that would have resulted from a conversion into Three per cent. Consols at the expiration of one year from the testator's decease. And in other later cases the Court, under similar circumstances, has apparently viewed the trustees as liable, and the tenant for life as liable over to the trustees, to the extent of his benefit (*a*).

78. Of conversion of assets in India.—Where a testator dies in India, and neither the fund nor the parties entitled to it are under the jurisdiction of the Court of Chancery, it is not the duty of the executor in India to transmit the assets to England to be invested in the Three per cent. Consols, but he may invest the property in the securities of the government of India, and the tenant for life will be entitled to

(*f*) *Howe v. Earl of Dartmouth*, 7 Ves. 137, see 150, 151; *Mills v. Mills*, 7 Sim. 501; and see *Pickering v. Pickering*, 4 M. & Cr. 289.

(*g*) See *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Holland v. Hughes*, 16 Ves. 114.

(*h*) 4 Russ. 195; and see *Mehrtens v. Andrews*, 3 Beav. 72.

(*a*) *Hood v. Clapham*, 19 Beav. 90; *Bate v. Hooper*, 5 De G. M. & G. 338.

the dividends or interest, whatever the amount. If the parties return to England, and so come under the jurisdiction of the Court, the fund may then be brought over at the instance of the remainderman, and the tenant for life must submit to the consequential reduction of his income (*b*).

79. **Trust to invest in the funds and the money is retained.** — If trustees be *expressly* bound by the terms of their trust to invest in the *public funds*, and instead of so doing they retain the money in their hands, the *cestuis que trust* may clearly elect to charge them with the amount of the money or with the amount of the stock which they might have purchased with the money (*c*).

80. **Trustees ordered to invest in stock or on real securities and neglecting to do either.** — If trustees or executors be directed by the will to convert the testator's property and invest it in *Government or real securities*, it was long a question whether they should be answerable for the principal money with interest, or the amount of stock which might have been purchased at the period when the conversion should have been made with subsequent dividends, at the option of the *cestuis que trust* (*d*); or whether they [*336] should be charged with the *amount of principal and interest only, without an option to the *cestuis que trust* of taking the stock and dividends (*a*). It has now been decided that the trustee is answerable only for the *principal money and interest*, and that the *cestuis que trust* have no option of taking the stock and dividends. The principle upon which the Court proceeds is, that the trustee

(*b*) *Holland v. Hughes*, 16 Ves. 111; S. C. 3 Mer. 685.

(*c*) *Shepherd v. Moulds*, 4 Hare, 504, per Sir J. Wigram; *Robinson v. Robinson*, 1 De G. M. & G. 256, per Cur.; *Byrchall v. Bradford*, 6 Mad. 13, 235. And it has been said, that if a trust be of a permanent character, in which case the Court expects trustees to invest in Consols, though the settlement contains no express direction to that effect, trustees who improperly retain the funds in their hands may perhaps be held liable, at

the option of the *cestui que trust*, for the principal sum or the amount of stock which it would have purchased; *Robinson v. Robinson*, 1 De G. M. & G. 256, per Cur.

(*d*) *Hockley v. Bantock*, 1 Russ. 141; *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379; *Onseley v. Anstruther*, 10 Beav. 456.

(*a*) *Marsh v. Hunter*, 6 Mad. 295; *Gale v. Pitt*, M. R. 10th May, 1830; *Shepherd v. Moulds*, 4 Hare, 500; *Rees v. Williams*, 1 De G. & Sm. 319.

is liable only for not having done what it was his duty to have done, and the measure of his responsibility is that which the *cestuis que trust* must have been entitled to in whatever mode that duty was performed; that the trustee might have discharged his duty without purchasing Three per cent. Bank Annuities; that the trustee is not to be deemed retrospectively to have exercised the discretion one way or the other, but is answerable only for the consequences of not having exercised the discretion; that to compel the trustee to purchase a sum of stock because the price has since risen, is to regulate the liability by an accidental subsequent occurrence, and not by the superiority of the stock over a mortgage at the time when the investment ought to have been made (b).

81. **Trustees selling out stock improperly.**—If the trust fund be *standing on a proper security*, and the trustee calls it in for no purpose connected with the trust, and therefore in dereliction of his duty, or for a purpose not authorised by the terms of the trust, he will be compellable, at the option of the *cestuis que trust*, either to replace the specific stock, or the stock into which, if not sold out, it would have been converted by Act of Parliament (c), with the intermediate dividends (d), or to account for the proceeds of the sale (e) with interest at 5 per cent. (f). And the breach of trust will not be cured by a subsequent reinvestment upon the trusts unless the reinvestment be the same *in specie* (g). But in a case where the trustee did not seek to make anything himself, but was honourably unfortunate in having

(b) *Robinson v. Robinson*, 1 De G. M. & G. 247.

(c) *Phillipson v. Gatty*, 7 Hare, 516; *Norris v. Wright*, 14 Beav. 304, 305; *Phillipo v. Munnings*, 2 M. & Cr. 309.

(d) *Davenport v. Stafford*, 14 Beav. 335.

(e) *Bostock v. Blakeney*, 2 B. C. C. 653; *Ex parte Shakeshaft*, 3 B. C. C. 197; *O'Brien v. O'Brien*, 1 Moll. 533, *per Sir A. Hart*; *Raphael v. Boehm*, 11 Ves. 108, *per Lord Eldon*;

Harrison v. Harrison, 2 Atk. 121; *Bate v. Scales*, 12 Ves. 402; *Phillipson v. Gatty*, 7 Hare, 516; *Norris v. Wright*, 14 Beav. 305; *Roland v. Witherden*, 3 Mac. & G. 568; *Wiglesworth v. Wiglesworth*, 16 Beav. 269.

(f) *Crackelt v. Bethune*, 1 J. & W. 587; *Mosley v. Ward*, 11 Ves. 581; *Pocock v. Reddington*, 5 Ves. 794; *Pietz v. Stace*, 4 Ves. 620; *Jones v. Foxall*, 15 Beav. 392.

(g) *Lander v. Weston*, 3 Drew. 309.

yielded to the importunity of one of the *cestuis que trust*, it was held by Sir A. Hart, that, although the trustee [*337] was bound to replace the specific *stock, the *cestuis que trust* should not have the option of taking the proceeds with interest (a). If the trustee become bankrupt, the *cestuis que trust* may at their option prove for the proceeds with interest, or for the price of the specific stock at the date of the bankruptcy with interim dividends (b).

82. **Neglect to invest property.**—If trustees be under an obligation to invest in the funds, and they pay the money into a *bank* with a direction to lay it out in Bank Annuities, and the bankers neglect to do it, and the trustees make no inquiry for five months, and the bankers fail, the trustees are answerable for the money or the stock at the option of the *cestuis que trust* (c).

83. **Trustees may not invest so as to subject the fund to the control of any one trustee.**—Trustees would not be justified in making any investment that would subject the trust money to the power or control of any *one* of the trustees singly; they could not, for instance, lay out the fund upon India bills (supposing such a security to be warranted by the settlement), if made payable, not to all the trustees in their joint capacity, but to one of the trustees individually (d).

84. **Solicitors.**—Solicitors employed in negotiating a loan of trust monies, may not be liable for a breach of trust if they have no other privity with the transaction than what arises from their professional duty, but they will be deemed trustees and be responsible as such if they act professionally in carrying out a transaction which they know to be a breach of trust, and which is calculated to promote their own private ends (e).

(a) O'Brien v. O'Brien, 1 Moll. 533.

(b) *Ex parte* Shakeshaft, 3 B. C. C. 197; *Ex parte* Gurner, 1 Mont. Deac. & De G. 497.

(c) *Challen v. Shippam*, 4 Hare, 555.

(d) *Walker v. Symonds*, 3 Sw. 1, see 66; and see *Salway v. Salway*, 2 R. & M. 218; *Ex parte* Griffin, 2 Gl. & J. 114; *Clough v. Dixon*, 8 Sim.

594; 3 M. & Cr. 490. But see *ante*, p. 295; *Mendes v. Guedalla*, 2 J. & H. 259; *Consterdine v. Consterdine*, 31 Beav. 330; [*Lewis v. Nobbs*, 8 Ch. D. 591.]

(e) *Alleyne v. Darcy*, 4 Ir. Ch. Rep. 199, see 204, 208; *Fyler v. Fyler*, 3 Beav. 550, and see *Barnes v. Addy*, 9 L. R. Ch. App. 244, and *post*, chap. xxx. s. 3.

85. Trustees lending should not employ the same solicitor as the borrower. — In laying out trust monies, trustees would do well not to employ the solicitor who acts for the borrower. Besides the inconveniences that arise from the doctrine of implied notice, there is in this case such a conflict of duties on the part of the solicitor, that he cannot adequately represent the interests of both lender and borrower (*f*).

*SECTION V.

[*338]

LIABILITY OF TRUSTEES TO PAYMENT OF INTEREST.

1. **General laches.** — It may be stated as a general rule, that if a trustee be guilty of any unreasonable delay in investing the fund or transferring it to the hand destined to receive it, he will be answerable to the *cestui que trust* for interest during the period of his *laches*; and a trustee has been decreed to pay interest even where it was not prayed by the bill (*a*); and in a suit establishing *laches*, will be decreed to pay personally the costs up to the hearing of a suit arising out of the *laches* (*b*).¹

(*f*) See *Waring v. Waring*, 3 Ir. Ch. Rep. 331.

(*a*) *Woodhead v. Marriott*, C. P. Coop. Cases, 1837-38, 62; *Turner v. Turner*, 1 J. & W. 39; *Stafford v. Fiddon*, 23 Beav. 286; *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Chugg*

v. Chugg, W. N. 1874, p. 185. But the court is not in the habit of giving interest on what may be found due for arrears of income, *Blogg v. Johnson*, 2 L. R. Ch. App. 225.

(*b*) *Ticknor v. Smith*, 3 Sm. & G. 42.

¹ *Interest.* — An executor is not usually chargeable with interest for the first year: beyond that interest will be required, and the principal too, if lost; *Minuse v. Cox*, 5 Johns. Ch. 441; *Carter v. Cutting*, 5 Munf. 224; if the executor receives interest during the first year he must account for it; *Wyman v. Hubbard*, 13 Mass. 232; *Stearns v. Brown*, 1 Pick. 530; *Lund v. Lund*, 41 N. H. 359; *Chambers v. Kerns*, 6 Jones Eq. 280.

If a trustee neglects to invest trust funds, uses them as his own, or fails to distribute them within a reasonable time, he will be liable for the legal rate of simple interest; *Wistar's App.* 54 Pa. St. 60; *Duffy v. Duncan*, 35 N. Y. 187; *Mumford v. Murray*, 6 Johns. Ch. 1; *Hess's Est.* 69 Pa. St. 272; *Owen v. Peebles*, 42 Ala. 338; *Kerr v. Laird*, 27 Miss. 544; *Nelson v. Bank*, 27 Md. 53; *Wright v. Wright*, 2 McCord Ch. 185; *Knowlton v. Bradley*, 17 N. H. 458. The trustees can make no gain from the trust funds, and if they receive a high rate of interest they must account for it all; *Martin v. Raborn*, 42 Ala. 648; *Barney v. Saunders*, 16 How. 543; if the trustee has not kept a clear account he will be chargeable with the legal rate; *Rapalje v. Hall*, 1 Sandf. Ch. 339;

2. *Executor must pay testator's debts as soon as he has assets.*—An *executor* or *administrator* should discharge the testator's liabilities as soon as he has collected assets sufficient for the purpose, and therefore if he keep money in his hands idle, when there is an outstanding debt upon which interest is running, he will himself be charged with interest on a sum equal in amount to the debt, and if the outstanding debt carry interest at 5 per cent. the executor will be charged with interest at the same rate (*c*).

(*c*) *Dornford v. Dornford*, as cited *Hall v. Hallet*, 1 Cox, 134; *Turner* in *Tebbs v. Carpenter*, 1 Mad. 301; *v. Turner*, 1 J. & W. 39.

Bentley v. Shreve, 2 Md. Ch. 219; but see *McKnight v. Walsh*, 24 N. J. Eq. 498. If the amounts involved are small, and the trustee receives no profit, the liability for interest may be modified; *Brand v. Abbott*, 42 Ala. 499; if the trustee pay the funds into court there can be no further claim for interest; *Young v. Brush*, 38 Barb. 294; *Brandon v. Hoggatt*, 32 Miss. 335; but these same cases hold that if any suits are pending in relation to the trust, the trustee must keep the money at interest.

If the trustee is directed to invest in a certain way within a limited time, and fails to do so, the *cestui que trust* may elect between the money together with its legal interest, or what he would have had as securities from the special investment with all actual dividends; *Durling v. Hammar*, 5 C. E. Green, 220; *McElhenny's App.* 46 Pa. St. 347.

If the trustee converts a properly invested trust fund into money, and neglects to reinvest it, invests it unwisely, or uses it in speculation, the *cestui que trust* may take what he would have received if the original investment had not been disturbed, or the fund and legal interest; or all that has been realized; *Norris's App.* 71 Pa. St. 125; *Kyle v. Barnett*, 17 Ala. 306. In the preceding cases, or in case of a mixture of trust with personal funds, the trustee may be charged with compound interest; *Elliott v. Sparrell*, 114 Mass. 404, but not unless the trustee is particularly blameworthy; *Fay v. Howe*, 1 Pick. 528; *Cartledge v. Cutliff*, 21 Ga. 1. The trustee must show that he received no profit or benefit from the money; *Hughes v. Smith*, 2 Dana, 253; *Karr v. Karr*, 6 Dana, 3; *Smith v. Kennard*, 38 Ala. 695; *Livingston v. Wells*, 8 S. C. 347; but see *Graver's App.* 50 Pa. St. 189. Where the funds were used in business compound interest is allowable; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *McKnight v. Walsh*, 23 N. J. Eq. 136.

The trustee must see to it that the *cestui que trust* receives the income, or it will bear interest.

Where the trustee had unnecessarily sold lands to pay debts and had also applied trust funds to his own use, the account was taken against him with annual rests; *Wiard v. Gable*, 8 Chy. 458; where a trustee had retained money six years after it should have been paid over, he was ordered to pay six per cent. annual interest; *Small v. Eccles*, 12 Chy. 37; *Wrightman v. Helliwell*, 13 Chy. 330; *Beaton v. Boomer*, 2 Chy. Chamb. 89. Interest is charged that the *cestui que trust* may not suffer loss, rather than for the purpose of punishing the trustee; *Inglis v. Beaty*, 2 App. R. 453.

3. **After payment of debts and legacies executor must account for surplus.**—After payment of debts and legacies, if the executor or administrator be guilty of *laches* in accounting for the surplus estate to the residuary legatee (*d*) or next of kin (*e*), he will be charged by the Court with interest for the balance improperly retained.

4. **Trustees under bankruptcy must not neglect to pay dividends.**—So, if the *trustee* of a bankrupt's estate neglect to pay a dividend to the creditors (*f*), or the *receiver* of an estate do not move * the Court in proper time to [*339] have the rents in his hands made productive (*a*), they will be ordered to account for the money with interest from the time when the breach of duty commenced.

5. **No excuse that the trustee or executor did not use the money.**—And an executor or other fiduciary cannot excuse himself by saying that he made no actual use of the money, but lodged it at his bankers (*b*), and to a separate account (*c*), for it was a breach of trust to retain the money.

6. **Delay may be explained by the mistake of the trustee or executor.**—But, where an executor conceived himself to be entitled to the residue, and the Court considered his claim to be just in itself, but was obliged from a particular circumstance in the case to give judgment against him, it was thought too severe to put him in the situation of one who

(*d*) *Forbes v. Ross*, 2 Cox, 113; *Seers v. Hind*, 1 Ves. jun. 294; *Younge v. Combe*, 4 Ves. 101; *Longmore v. Broom*, 7 Ves. 124; *Rocke v. Hart*, 11 Ves. 58; *Piety v. Stace*, 4 Ves. 620; *Ashburnham v. Thompson*, 13 Ves. 402; *Raphael v. Boehm*, 11 Ves. 92; *S. C.* reheard, 12 Ves. 407; *S. C.* spoken to, 11 Ves. 590; *Dornford v. Dornford*, 12 Ves. 127; *Franklin v. Frith*, 3 B. C. C. 433; *Littlehales v. Gascoyne*, 3 B. C. C. 73; *Newton v. Bennet*, 1 B. C. C. 359; *Lincoln v. Allen*, 4 B. P. C. 553; *Crackelt v. Bethune*, 1 J. & W. 586; *Tebbs v. Carpenter*, 1 Mad. 290.

(*e*) *Hall v. Hallet*, 1 Cox, 134; *Perkins v. Baynton*, 1 B. C. C. 375; *Stacpoole v. Stacpoole*, 4 Dow, 209,

see 224; *Heathcote v. Hulme*, 1 J. & W. 122; *Holgate v. Haworth*, 17 Beav. 259.

(*f*) *Treves v. Townshend*, 1 B. C. C. 384; *In re Hilliard*, 1 Ves. jun. 89; *Hankey v. Garrett*, 1 Ves. jun. 236.

(*a*) *Foster v. Foster*, 2 B. C. C. 616; *Hicks v. Hicks*, 3 Atk. 274.

(*b*) *Younge v. Combe*, 4 Ves. 101; *Franklin v. Frith*, 3 B. C. C. 433; *Treves v. Townshend*, 1 B. C. C. 384; *In re Hilliard*, 1 Ves. jun. 89; *Dawson v. Massey*, 1 B. & B. 230; *Browne v. Southouse*, 3 B. C. C. 107; and see *Rocke v. Hart*, 11 Ves. 60.

(*c*) *Ashburnham v. Thompson*, 13 Ves. 402.

had neglected his duty, and the demand against him for interest was consequently disallowed (*d*).

7. **Formerly the executor might have used the assets.**—Formerly it was held that an executor might employ the assets in his trade, or lend them upon security, and he should not be called upon to account for the profits or interest (*e*). And such was the case even where money which had been lent by the testator on good security was called in by the executor for the express purpose of being re-lent by himself. For the executor, it was argued, was not bound to lend the assets, and if he did so, it was at his peril, and he was answerable for losses, and if accountable for any loss, he was surely entitled to any gains (*f*). But Lord North overruled the doctrine in spite of the alleged practice of the Court for the last twenty years, and the authority of above forty precedents; and as to the argument, that, if the money should be lost, the executor would be personally responsible, his Lordship said, it was very well known that a man might insure his money at the rate of *one per cent.* (*g*).

8. **At least where he was solvent.**—A distinction was afterwards taken between a *solvent* and an *insolvent* executor; that the former, as he might suffer a loss, should take the gain, but, as an executor who was insolvent at the time of the loan could incur no risk of a loss personally, he should not be allowed to take to himself any benefit (*h*).

[*340] *9. **And where the assets used were not specifically bequeathed.**—And Lord Hardwicke drew another distinction; that if an executor had *placed out* assets that were *specifically bequeathed*, he would be made to account for the interest, but that the Court never directed interest against an executor who made use in the way of his trade of *general* assets come to his hands (*a*).

(*d*) *Bruere v. Pemberton*, 12 Ves. 386; but see *Sutton v. Sharp*, 1 Russ. 146; *Turner v. Maule*, 3 De G. & Sm. 497; [*Evans v. Evans*, W. N. 1876, p. 205.]

(*e*) *Grosvenor v. Cartwright*, 2 Ch. Ca. 21; *Linch v. Cappy*, 2 Ch. Ca. 35; and see *Brown v. Litton*, 1 P. W. 140.

(*f*) See *Ratcliff v. Graves*, 2 C. Ca. 152.

(*g*) *Ratcliff v. Graves*, 1 Vern. 196; S. C. 2 Ch. Ca. 152.

(*h*) *Bromfield v. Wytherley*, Pr. Ch. 505; *Adams v. Gale*, 2 Atk. 106.

(*a*) *Child v. Gibson*, 2 Atk. 603.

10. Rule now general that executor must account for all profits. — But all these refinements have long since been swept away (*b*); and the rule is now *universal*, that, whether the executor be solvent or insolvent, whether the money be part of the general assets or specifically bequeathed, whether it be lent upon security or employed in the way of trade, the executor shall account for the utmost actual profits to the testator's estate (*c*).

11. Trustee using trust money in trade must account for it with 5 per cent. interest, or the actual profits. — Where the money has been employed by breach of trust in trade, the *cestui que trust* has the option of taking the actual profits or of charging the executor with interest (*d*). And the executors cannot disguise the employment of the money in their business under the garb of a *loan* to one of themselves (*e*). And an executor who is a trader is considered to employ the money in trade, if he lodge it at his banker's and place it in his own name, for a merchant must generally keep a balance at his banker's, and this answers the purpose of his credit as much as if the money were his own (*f*).

12. Executor charged with 4 per cent. interest only unless he made more. — The rate of interest with which an executor is usually charged is 4 per cent. (*g*); but the rule holds only

(*b*) As to the former distinction, see *Newton v. Bennet*, 1 B. C. C. 361; *Adye v. Feuilliteau*, 1 Cox, 25; and as to the latter, see *Newton v. Bennet*, 1 B. C. C. 361.

(*c*) *Tebbs v. Carpenter*, 1 Mad. 304, *per* Sir T. Plumer; *Lee v. Lee*, 2 Vern. 548; *Adye v. Feuilliteau*, 1 Cox, 24; *Piety v. Stace*, 4 Ves. 622, *per* Lord Alvanley.

(*d*) *Heathcote v. Hulme*, 1 J. & W. 122; *Anon. case*, 2 Ves. 630, *per* Sir T. Clarke; *Docker v. Somes*, 2 M. & K. 655; *Ex parte Watson*, 2 V. & B. 414; *Brown v. Sansome*, 1 M'Clel. & Y. 427; *Robinson v. Robinson*, 1 De G. M. & G. 257; see *ante*, p. 276, 277.

(*e*) *Townend v. Townend*, 1 Giff. 201.

(*f*) *Treves v. Townshend*, 1 B. C. C. 284; *Moons v. De Bernalles*, 1 Russ. 301; *In re Hilliard*, 1 Ves. jun. 90;

Sutton v. Sharp, 1 Russ. 146; *Rocke v. Hart*, 11 Ves. 61; but see *Browne v. Southouse*, 3 B. C. C. 107.

(*g*) See *Fletcher v. Green*, 33 Beav. 426; *Forbes v. Ross*, 2 Cox, 116; *Hall v. Hallet*, 1 Cox, 138; *Tebbs v. Carpenter*, 1 Mad. 306; *In re Hilliard*, 1 Ves. jun. 90; *Browne v. Southouse*, 3 B. C. C. 107; *Mosley v. Ward*, 11 Ves. 582; *Perkins v. Baynton*, 1 B. C. C. 375; *Treves v. Townshend*, 1 B. C. C. 386; *Hicks v. Hicks*, 3 Atk. 274; *Younge v. Combe*, 4 Ves. 101; *Rocke v. Hart*, 11 Ves. 58; *Hankey Garret*, 1 Ves. jun. 236; but see *Bird v. Lockey*, 2 Vern. 744, 4th point; *Carmichael v. Wilson*, 3 Moll. 79; *Attorney-General v. Alford*, 4 De G. M. & G. 843; *Johnson v. Prendergast*, 28 Beav. 480. [*Re Emmet's Estate*, 17 Ch. D. 142.]

where it does not appear that the executor has made greater interest, for the Court invariably compels the executor to account for every farthing he has actually received (*h*).

[*341] *18. Under what circumstances trustees will be charged with extra interest. — It is not easy to define the circumstances under which the Court will charge executors and trustees with *more than 4 per cent.* interest or with *compound* interest. In a late case it was laid down by Sir John Romilly, M. R.: 1. That if an executor retain balances in his hands, which he ought to have invested, the Court will charge him with simple interest, at 4 per cent. 2. That if, in addition to such retention, he has *committed a direct breach of trust*, or if the fund has been taken by him from a proper state of investment, in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum. 3. That if in addition to this, he has employed the money so obtained by him in trade or speculation, for his own benefit or advantage, he will be charged either with the profits actually obtained from the use of the money, or with interest at 5 per cent. per annum, and also with yearly rests, that is, with compound interest (*a*).

14. Trustees charged with 5 per cent. where gross misconduct. — The dicta and decisions undoubtedly seem to establish, in accordance with the view just quoted, that an executor will be charged with interest at 5 per cent. where he is guilty, not merely of negligence, but of actual corruption or misfeasance, amounting to a wilful breach of trust (*b*). But in *Attorney-General v. Alford* (*c*), Lord Cranworth expressed

(*h*) *Forbes v. Ross*, 2 Cox, 116, per Lord Thurlow; *In re Hilliard*, 1 Ves. jun. 90, per eundem; *Hankey v. Garret*, 1 Ves. jun. 230, per eundem; *Brown v. Litton*, 10 Mod. 21, per Lord Harcourt; *Hall v. Hallet*, 1 Cox, 138, per Lord Thurlow.

(*a*) *Jones v. Foxall*, 15 Beav. 392; and see *Saltmarsh v. Barrett* (No. 2), 31 Beav. 349; [*Gilbert v. Price*, W. N. 1878, p. 117. In *Jamaica* interest at the rate of 6 per cent. per annum will be allowed; *De Cordova v. De Cordova*, 4 App. Cas. 692.]

(*b*) *Tebbs v. Carpenter*, 1 Mad. 306, per Sir T. Plumer; *Bick v. Motley*, 2 M. & K. 312; *Mousley v. Carr*, 4 Beav. 53, per Lord Langdale; and see *Crackelt v. Bethune*, 1 J. & W. 588; *Docker v. Somes*, 2 M. & K. 670; *Munch v. Cockerell*, 5 M. & Cr. 220; *Ex parte Ogle*, 8 L. R. Ch. App. 716; *Hooper v. Hooper*, W. N. 1874, p. 174. But see *Meador v. McCready*, 1 Moll. 119.

(*c*) *Attorney-General v. Alford*, 4 De G. M. & G. 851, 852; and see *Vyse v. Foster*, 8 L. R. Ch. App. 333; affirmed 7 L. R. H. L. 318.

his disapprobation of charging the executor with a higher rate of interest by way of *penalty*; and laid it down that an executor was chargeable only with the interest which he had received, *or* which he ought to have received, *or* which it was so fairly to be presumed that he had received that he was estopped from saying that he did not receive it. And it was subsequently observed by V. C. Wood that there were three cases where the Court charged more than 4 per cent. upon balances in the hands of a trustee:—1. Where he *ought* to have received more, as by improperly calling in a mortgage carrying 5 per cent.; 2. Where he had *actually received* more than 4 per cent.; and 3. Where he must be *presumed* to have received more, as if he had traded with the money (*d*).

But in a subsequent case, Lord *Cranworth offered [*342] some explanatory remarks (*a*) upon the notions imputed to him; L. J. James, however, in a recent case (*b*) approved of the doctrine thought to have been laid down by Lord Cranworth, viz., that the Court had no jurisdiction to punish an executor for misconduct by making him account for more than he actually received, or which it presumed he did receive, or ought to have received, and that the Court was not a Court of penal jurisdiction.

15. **Money used in trade.**—Where money has been employed in trade, the *rate of* interest has been almost invariably 5 per cent. (*c*), the Court presuming every business to yield a profit to that amount. But Lord Thurlow, in one case, offered an inquiry whether, under the circumstances,

(*d*) Penny v. Avison, 3 Jur. N. S. 62; and see Burdick v. Garrick, 5 L. R. Ch. App. 233; [Price v. Price, 42 L. T. N. S. 626; but see Re Jones, 49 L. T. N. S. 91, where the executors and trustees were charged 5 per cent. on the balance in their hands, V. C. Bacon observing that if a man choose not to invest money, but pays it into his account at his bankers, he borrows it, and must pay 5 per cent. from the date of the payment of the testator's debts and liabilities.]

(*a*) Mayor of Berwick v. Murray, 7 De G. M. & G. 519; and see Townsend v. Townend, 1 Giff. 212.

(*b*) Vyse v. Foster, 8 L. R. Ch. App. 333, affirmed 7 L. R. H. L. 318. But see *Ex parte* Ogle, 8 L. R. Ch. App. 716.

(*c*) Treves v. Townshend, 1 B. C. C. 384; Roche v. Hart, 11 Ves. 61, per Sir W. Grant; Heathcote v. Hulme, 1 J. & W. 122, see 134; Attorney-General v. Solly, 2 Sim. 518; Mousley v. Carr, 4 Beav. 53, per Lord Langdale; Westover v. Chapman, 1 Coll. 177; Williams v. Powell, 15 Beav. 461; Robinson v. Robinson, 1 De G. M. & G. 257; Burdick v. Garrick, 5 L. R. Ch. App. 233.

such a rate of interest might not be too high (*d*); and in another, where an executor could plead extenuating circumstances 4 per cent. only was charged (*e*).

16. **Whether simple or compound interest chargeable where moneys used by executor or trustee in trade.**—Whether, where the money has been employed in trade, *simple* or *compound* interest shall, *as a general rule*, be charged, is a point upon which the decisions are in conflict, the older authorities pointing to *simple* interest as the proper measure of liability, and the more recent to *compound* interest. The earliest reported case in which a trustee who had used trust money in trade appears to have been charged compound interest is that of *Walker v. Woodward* (*f*). The late Vice-Chancellor of England refused to charge a trustee of a charity estate, who had used the trust monies in carrying on his trade, with compound interest (*g*); but Sir John Leach charged an executor with compound interest under similar circumstances (*h*), and in other later decisions Sir John Romilly, M. R., in accordance with the rule laid down by him (as before stated), directed an account with rests (*i*). But in a [*343] later case still, *the Court of Appeal refused to direct compound interest (*a*). [In a still later case where an administratrix had allowed her solicitor to receive and retain the dividends on securities, which had been set apart for an infant next-of-kin, she was decreed to account for the dividends with interest at 3 per cent. with half yearly rests, on the ground that the administratrix ought to have had the dividends invested from time to time in consols, and the proceeds would have formed a common fund with the existing securities, and the dividends would thus have been invested at compound interest (*b*).]

17. **Trustee neglecting a direction to accumulate, will be**

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| (<i>d</i>) <i>Treves v. Townshend</i> , 1 B. C. C. 384. | (<i>i</i>) <i>Jones v. Foxall</i> , 15 Beav. 388; <i>Williams v. Powell</i> , Id. 561; and see |
| (<i>e</i>) <i>Melland v. Gray</i> , 2 Coll. 295. | <i>Walrond v. Walrond</i> , 29 Beav. 586. |
| (<i>f</i>) 1 Russ. 107. | (<i>a</i>) <i>Burdick v. Garrick</i> , 5 L. R. Ch. App. 233. |
| (<i>g</i>) <i>Attorney-General v. Solly</i> , 2 Sim. 518. | [(<i>b</i>) <i>Gilroy v. Stephens</i> , 51 L. J. N. S. Ch. 834.] |
| (<i>h</i>) <i>Heighington v. Grant</i> , 5 M. & Cr. 258; 2 Ph. 600. | |

charged with compound interest.—If a testator *expressly directs an accumulation* to be made, and the executor having the money in his hands disregards the injunction it seems *compound interest* will be decreed (c). “Where there is an express trust,” said Lord Eldon, “to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as to the principal, to have lent the money to himself, upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it if it be principal, and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest” (d). [If the accumulation be directed only during the minority of the *cestui que trust* with a direction to hand the fund over to him on his attaining 21, and the trustee after the determination of the minority, in lieu of paying over the trust funds, retains them uninvested or improperly invested, the trustee will be charged with compound interest (e).]

18. **Executor not charged with interest during first year from testator's death.**—An *executor* will not in general be charged with interest but from the *end of a year* from the time of the testator's decease. “It frequently,” said Lord Thurlow, “may be necessary for an executor to keep large sums in his hands, especially in the course of the *first year* after the decease of the testator, in which case such necessity is so fully acknowledged, that, according to the constant course of the Court, the fund until that time is not considered distributable. *After that*, if the Court observes that an executor keeps money in his hands without any apparent reason, but merely for the purpose of using it, then it becomes negligence and a breach of trust, the *conse- [*344] quence of which is that the Court will charge the executor with interest” (a).

(c) *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Dornford v. Dornford*, 12 Ves. 127; *Brown v. Sansome*, 1 M'Clel. & Younge, 427; *Knott v. Cottee*, 16 Beav. 77; *Pride v. Fooks*, 2 Beav. 430; *Wilson v. Peake*, 3 Jur. N. S. 155.

(d) *Raphael v. Boehm*, 11 Ves. 107; and see S. C. 13 Ves. 411.

[(e) *Re Emmet's Estate*, 17 Ch. D. 142.]

(a) *Forbes v. Ross*, 2 Cox, 115; and see the observations of Sir A. Hart, in *Flanagan v. Nolan*, 1 Moll. 85;

19. **No interest on money lost that never came to hand.** — It will be observed that, in the preceding cases, trustees and executors have been decreed to pay interest in respect only of monies actually come to hand, and improperly retained; for when a fund has *never been received*, but has been inexcusably left outstanding and lost, it seems the Court contents itself with holding the trustees liable for the *principal*, without enforcing against them the equity, that as the fund, if got in, would have become productive, the trustees ought further to be charged with interest (*b*).

20. **Mistake.** — Where an executor, under a mistaken impression of the law, but acting *bonâ fide*, retained one-third of the residue himself, and paid two-thirds to his co-executors, he was held accountable to the person entitled for the whole, but with interest only upon the one-third retained by himself (*c*).

SECTION VI.

OF THE DISTRIBUTION OF THE TRUST FUND.

1. **Mistake as to rights is at the expense of the trustee.** — It is incumbent upon the trustee to satisfy himself beyond doubt, before he parts with the possession of the property, *who* are the parties legally and equitably entitled to it. He must therefore attend to all claims of which he has notice; and he may compel all persons who claim to be *cestuis que trust* to set forth their title (*d*).

2. **Quasi trustees.** — The necessity of seeing that the trust-money reaches the proper hand is obligatory, not only on trustees regularly invested with the character, but on all persons having notice of the equities, as if A. lend a sum to B., and B. afterwards discovers that it is *trust money*, he cannot

and see *Moyle v. Moyle*, 2 R. & M. 710; *Johnson v. Newton*, 11 Hare, 160; *Hughes v. Empson*, 28 Beav. 181; *Johnson v. Prendergast*, 22 Beav. 480.

(*b*) *Tebbs v. Carpenter*, 1 Mad. 290; and see *Lowson v. Copeland*, 2 B. C. C. 156.

(*c*) *Saltmarsh v. Barrett* (No. 2), 31 Beav. 349; but see *Attorney-General v. Köhler*, 8 Jur. N. S. 467; 9 H. L. C. 655; *Shaw v. Turbett*, 14 Ir. Ch. Rep. 476.

(*d*) *Hurst v. Hurst*, 9 L. R. Ch. App. 762; and see *post*, 349, note (*f*).

pay it back to A. unless A., as trustee, had a power of signing a receipt for it (e).

3. *Derivative equities.* — As to persons claiming *directly* under the instrument creating the trust, or their real or personal representatives, the trustee has express notice of the rights of parties, and must regulate his conduct * accordingly. But other interests may grow out of [*345] and be *grafted upon* the original trust, as by appointment under a power or by assignment, and these the trustee cannot know except by express or implied notice subsequent to the creation of the trust. Thus, a fund is settled upon trust for A. for life, with remainder to such one or more of his children as A. shall appoint, and in default of appointment for his children equally. Here A. may exercise the power by appointing to some one child exclusively, or a child may assign his share to a stranger. In such cases the trustee must use his best endeavours to ascertain who are the persons equitably entitled, as he is always in danger of being affected by *constructive* notice. But if a trustee has no express notice and cannot be affected by constructive notice, and he pays at the proper time to the person *prima facie* entitled under the original instrument, he cannot afterwards be made to account over again to the person claiming under the *derivative* title (a), and therefore a trustee under such circumstances is not justified in paying the fund into Court under the Trustee Relief Act (b).

[4. *Improvident cestui que trust.* — If the *cestui que trust* is *sui juris* and absolutely entitled to the trust fund, the trustees are not justified in withholding payment on the ground that the beneficiary intends to deal improvidently with the fund, and if they do so they will be liable for the costs of an action to enforce payment (c).]

(e) *Sheridan v. Joyce*, 7 Ir. Eq. Rep. 115. As to powers of trustees to sign receipts, see *ante*, pp. 293, 294.

(a) *Cothay v. Sydenham*, 2 B. C. C. 391; *Phipps v. Lovegrove*, 16 L. R. Eq. 80; *Leslie v. Baillie*, 2 Y. & C. C. C. 91. In the latter case the effect of the marriage by the opera-

tion of a *foreign law*, may be regarded as equivalent to an assignment of which the trustee had not notice.

(b) *In re Cull's Trusts*, 20 L. R. Eq. 561.

[(c) *De Burgh v. M'Clintock*, 11 L. R. Ir. 220.]

5. **Assignment.** — After notice of an assignment the trustee cannot safely pay either principal or *interest* to the assignor (*d*) though the assignment be by way of mortgage only, for though a mortgagor in possession of real estate is not accountable for the *rents* until notice of the mortgagee's intention to enter, it cannot be assumed that the same rule will apply to personal estate in the hands of a trustee, as to which it has been said that the act of giving notice to the trustee is equivalent to taking possession (*e*). [It has even been held that where a first mortgagee of a leasehold house had notice of a second charge, and the property was subsequently sold by the mortgagor and the first mortgagee concurred in the sale, and allowed the balance of the purchase-money after satisfying his mortgage to be paid to the mortgagor, he was liable to the second mortgagee (*f*).]

[*346] *6. **Impeachable deeds.** — An assignment is sometimes, though not void *per se*, yet of an *impeachable* character, as where there is a suspicion of the undue exercise of parental influence. In these cases it is conceived that while the deed remains unimpeached, the trustee may safely act on the assumption of its validity (*a*).

7. **Assignment with receipt clause.** — If the assignment confer on the assignee a power of signing receipts, the production of the deed with a receipt entitles the assignee to call for payment without tendering a release (*b*).

8. **Death of cestui que trust.** — If the *cestui que trust* be dead the trustee must pay to his personal representative, and if he mix himself up with questions arising out of the *cestui que trust's* will, and so refuse to pay to the personal representative, he will be saddled with the costs of a suit for recovery of the fund (*c*).

9. **Divorce of cestui que trust.** — If the *cestui que trust* be a *feme* formerly married, but whose marriage has been dis-

(*d*) *Cresswell v. Dewell*, 4 Giff. 460.

(*a*) See *Beddoes v. Pugh*, 26 Beav.

(*e*) See *Loveridge v. Cooper*, 3 Russ. 58.

407.

(*b*) *Foligno's Mortgage*, 32 Beav.

[(*f*) *West London Commercial* 131.

Bank v. Reliance Permanent Building Society, 27 Ch. D. 187.]

(*c*) *Smith v. Bolden*, 33 Beav. 262.

solved (*d*), or there has been a judicial separation (*e*), [or a protection order (*f*),] the *chose en action*, though it accrued in right before the dissolution of marriage or the separation, [or protection order] is payable to the wife just as if the husband had previously died.

[**Protection order.**—And the *feme's* right of disposition extends, in the case of a *judicial separation* or *protection order in case of desertion*, to any property to which she was entitled in remainder or reversion at the date of the decree or of the desertion; but in the case of a protection order on the ground of assault the order is to have the same effect in all respects as a decree for separation on the ground of cruelty, and the protection will only commence as at the date of the order (*g*). On the resumption of cohabitation the property belongs to the *feme* for her separate estate (*h*).]

10. **Right of surviving trustee to have another trustee appointed.**—If a *surviving* trustee be placed in an *embarrassing* situation as regards the distribution or management of the fund, it is *said* that he has a right to ask for the appointment of a new trustee to assist him by his counsel (*i*).

11. **Advice of counsel.**—If through any misapprehension on the part of the trustee, * or the ill-advice [*347] of his counsel, the trust money finds its way into a channel not authorised by the terms of the trust, the trustee will be held personally responsible for the misapplication to the parties who can establish a better claim. "I have no doubt," said Lord Redesdale, upon one occasion, "the executors *meant* to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon

(*d*) *Wells v. Malbon*, 31 Beav. 48; *Wilkinson v. Gibson*, 4 L. R. Eq. 162; and see *Fitzgerald v. Chapman*, 1 Ch. D. 563.

(*e*) *Johnson v. Lander*, 7 L. R. Eq. 228.

[(*f*) 20 & 21 Vict. c. 85; ss. 21, 25; 21 & 22 Vict. c. 108, s. 8; 41 Vict. c. 19, s. 4; *Re Coward and Adams*, Purchase, 20 L. R. Eq. 179; *Nicholson v. Drury Buildings Estate Company*, 7

Ch. D. 48; *Norton v. Molloy*, 7 L. R. Ir. 287, under the corresponding Act relating to Ireland, 28 Vict. c. 43.]

[(*g*) See the statutes above referred to, note (*f*).]

[(*h*) *Re Emery's Trusts*, 50 L. T. N. S. 197; 32 W. R. 357; 20 & 21 Vict. c. 85, s. 25.]

(*i*) *Livesay v. O'Hara*, 14 Ir. Ch. Rep. 12.

the acts he has done. If under the best advice he could procure he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer" (a).

In one case where a testator had executed a promissory note in Switzerland for 600*l.*, but by a counter-note executed shortly after it was declared that 400*l.* only was due upon valuable consideration, but a Swiss Court, upon proceedings taken there, had awarded the payment of the whole 600*l.*, and the executor in England (though by our law but 400*l.* was demandable) had discharged the whole amount, Lord Alvanley observed, "*If the executor had taken advice, and been advised by any gentleman of the law in this country that he was bound to make this payment, I would not have held him liable, for I will not permit a testator to lay a trap for his executor, by doing a foolish act which may mislead him*" (b). But these remarks were addressed to the special circumstances of the case, and must not be taken as impugning the general rule.

12. **Foreign law.** — Every executor is taken to know the law of his country, but otherwise as to foreign laws. Thus, where a legacy was given to a married woman domiciled in Scotland, and before payment of the legacy the husband died, and the executors of the testator paid the legacy to the wife, and the executors of the husband afterwards sued the executors of the testator for the same legacy on the ground that, by the law of Scotland where the wife was domiciled, the *chose en action* did not survive as by the law of England to the wife, but passed to the representatives of the husband, it was held, that the executors were not bound to know the law of Scotland, and that as they had acted accord-

(a) *Doyle v. Blake*, 2 Sch. & Lef. 243; and see *Re Knight's Trusts*, 27 Beav. 49; *Urch v. Walker*, 3 M. & Cr. 705, 706; *Turner v. Maule*, 3 De G. & Sm. 497; *Peers v. Ceeley*, 15 Beav. 209; *Ex parte Norris*, 4 L. R. Ch. App. 280. [*Re Jackson*, 44 L. T. N. S. 467.] In *Boulton v. Beard*, 3 De G. M. & G. 608, the fact that the trustees had acted upon the advice of counsel, though stated at the bar, was not in

evidence, which may account for the silence of the L. J.J. upon this point in their judgments.

(b) *Vez v. Emery*, 5 Ves. 141. As to the effect in reference to costs, of acting under advice of counsel, see *Angier v. Stannard*, 3 M. & K. 566; *Devey v. Thornton*, 9 Hare, 232; *Field v. Donoughmore*, 1 Dru. & War. 234.

ing to the *prima facie* line of their * duty and the [*348] ordinary practice, and express notice to them of the law of Scotland had not been proved, they were not answerable (a).

13. **Foreign domicile.** — As personal property is regulated by the law of the domicile, the trustee, if a *cestui que trust* be domiciled abroad, should be careful how he deals with the interest of that *cestui que trust*. By the law of some countries a male does not attain majority till twenty-two, but a female at seventeen (b); and in other countries, as in Scotland, infants above the age of puberty (fourteen in males, and twelve in females) can with their curators give valid receipts for debts and legacies (c). In some countries the wife has an equity to a settlement, and in others (as in Denmark) she has not (d). [In the State of New York, the wife is entitled to a legacy or distributive share, as if she were sole (e).] In Australia, the Court pays the money of a married woman to the husband, without examination of the wife (f). If the trustee has no notice of the difference between the two laws, he might not be liable, but the safer course would be to make inquiry.

14. **Presumption of death.** — It often happens that a *cestui que trust* has gone abroad and has *not been heard of for seven years*, and in that case the law presumes for certain purposes that the person was dead at the expiration of the seven years, but not that he died at any particular moment of that period (g). But as the fact of death is presumed only, the conclusion of law may be rebutted by explanatory circumstances (h); [and the *onus* of proving at what particular time the death took place lies with the person asserting a right depending on the death having occurred at that

(a) *Leslie v. Baillie*, 2 Y. & C. C. C. 91.

(b) *Re Hellman's Will*, 2 L. R. Eq. 363; and see *Re Blithman*, 2 L. R. Eq. 23.

(c) *Re Chrichton's Trusts*, 24 L. T. 267.

(d) *Dues v. Smith*, Jac. 544.

[(e) *Re Lett's Trusts*, 7 L. R. Ir. 132.]

(f) *Re Swift's Trusts*, W. N. 1872, p. 195.

(g) *Dunn v. Snowden*, 2 Dr. & Sm. 201; *Lamb v. Orton*, 6 Jur. N. S. 61; *Nepean v. Doe*, 2 M. & W. 894; and see *Sillick v. Booth*, 1 Y. & C. C. C. 117; *Re Phene's Trust*, 5 L. R. Ch. App. 139.

(h) *Bowden v. Henderson*, 2 Sm. & G. 360.

time (i).] Should the person afterwards reappear in fact, he may assert his right (j); and accordingly, where the Court pays out money on presumption of death, it requires the recipient to give security to refund it if necessary (k). It is evident therefore that a trustee *in pais* — that is, out of

Court — cannot safely pay at the expiration of the [*349] * seven years, but must accumulate the fund until he is satisfied of the actual death, or a sufficient indemnity is offered, or the sanction of the Court has been obtained (a).

15. **Mistake.** — If an executor or trustee has made a wrong payment, and is afterwards obliged to pay over again to the person rightfully entitled, he is not chargeable with interest, provided the erroneous payment was a *bond fide* mistake (b), and of course a wrongful payment of interest will not create in the payee a right to the principal, for no wrong can create a right (c). The trustee of a creditor's deed made a mistake in payment arising out of a misapprehension of the law, which at that time was not clear, and the Court held that as he had acted *bond fide* and was not a mere trustee, but filled a *quasi* judicial position, he could not be made accountable to the creditors, who were left to recover the amount from the person wrongfully paid (d).

[16. **Income tax.** — If an executor or trustee pay the income of a trust fund to the *cestui que trust* for several years without deducting the income tax, he will not be allowed afterwards to deduct the amount of such income tax on the past payments from future accretions of income (e).]

17. **Claim by another.** — As a trustee cannot be expected to part with the fund unless the right of the *cestui que trust* be undisputed, if a third person claim improperly, or refuse

[(i) *Re Phene's Trusts*, 5 L. R. Ch. App. 139; *Re Lewes' Trusts*, 6 L. R. Ch. App. 356; *Re Corbishley's Trusts*, 14 Ch. D. 846.]

(j) *Woodhouslee v. Dalrymple*, 9 W. R. 475, 584; and see *Monckton v. Braddell*, 7 I. R. Eq. 30; 6 I. R. Eq. 352.

(k) *Dowley v. Winfield*, 14 Sim. 277; *Cuthbert v. Purrier*, 2 Ph. 199; and see *Davies v. Otty*, 35 Beav. 208.

(a) See *Re Phene's Trusts*, 5 L. R. Ch. App. 139; *Hickman v. Upsall*, 20 L. R. Eq. 136.

(b) *Saltmarsh v. Barrett* (No. 2), 31 Beav. 349.

(c) *Remnant v. Hood*, 2 De G. F. & J. 404.

(d) *Ex parte Ogle*, 8 L. R. Ch. App. 711.

[(e) *Currie v. Goold*, 2 Mad. 163.]

to say whether he claims or not in a case where the trustee has a right to ask the question, such third person will make himself amenable to costs (*f*).

18. **Bond of indemnity.**—In cases where there exists a mere shadow of doubt as to the rights of the parties interested, and it is highly improbable that any adverse claim will, in fact, be ever advanced, the protection of the trustee may be provided for by a substantial bond of indemnity. In general, however, a bond of indemnity is a very unsatisfactory safeguard, for when the danger arises, the obligors are often found insolvent, or their assets have been distributed. And if the bond be to indemnify against a breach of trust, the Court is not disposed to show mercy towards a trustee who admits himself to have *wilfully* erred by having endeavoured to arm himself against the consequences (*g*).

* 19. **Suit.**—A trustee cannot be expected to incur [*350] the least risk, and therefore if the equities be not perfectly clear, he should decline to act without the sanction of the Court, and he will be allowed all costs and expenses incurred by him in an application for that purpose (*a*). But as a trustee is indemnified by the decree of the Court, he will *appeal* from any decision to the Court above at *his own risk* (*b*). If the rights be perfectly clear, and the trustee appeals to the Court without reason, he will be answerable in costs, though he do not act either fraudulently or maliciously (*c*).

20. **Trustee Relief Act.**—If there be no dispute as to the *amount* of the fund, but only as to *who* is entitled to it, and the trustee, instead of transferring the fund into Court under

(*f*) See *Re Primrose*, 28 Beav 590; *Loneragan v. Stourton*, 11 W. R. 984.

(*g*) A verbal promise of indemnity has been held not to be within the Statute of Frauds, *Wildes v. Dudlow* 19 L. R. Eq. 198.

(*a*) *Re Wyllly's Trust*, 28 Beav. 458; *Talbot v. Earl of Radnor*, 3 M. & K. 252; *Goodson v. Ellison*, 3 Russ. 583; *Curteis v. Candler*, 6 Mad. 123; *Knight v. Martin*, 1 R. & M. 70; S. C. Taml. 237; *Taylor v. Glanville*, 3

Mad. 176; *Angier v. Stannard*, 3 M. & K. 566. And see *Campbell v. Home*, 1 Y. & C. C. C. 664; *Gardiner v. Downes*, 22 Beav. 397; *Merlin v. Blaggrave*, 25 Beav. 137; *Cook v. Harvey*, W. N. 1874, p. 69.

(*b*) *Rowland v. Morgan*, 13 Jur. 23; *Tucker v. Horneman*, 4 De G. M. & G. 395; and see *Wellesley v. Mornington*, W. N. 1870, p. 192.

(*c*) *Re Knight's Trust*, 27 Beav. 45; *Lowson v. Copeland*, 2 B. C. C. 156.

the provisions of the Trustee Relief Act (*d*), needlessly commences an action, he will be allowed only the costs that would have been incurred had he taken advantage of the Trustee Relief Act (*e*).

[21. **Originating summons.** — Under the new Rules of Court, an inexpensive process has been introduced which enables either trustees, executors, or administrators, or their *cestuis que trust*, by means of an originating summons, to procure the determination *without an administration by the Court of the estate or trust*, of various questions and matters arising out of or affecting the trusts or the persons interested thereunder, or to obtain an order for the administration of the estate or trust without the delay and formalities of an action (*f*); but this form of proceeding is not applicable to a case where an executor has distributed the fund, and administration is sought on the ground that he has by mistake overlooked in the distribution some of the *cestuis que trust* (*g*).]

Under this rule, the question of the validity of a release given by legatees, without (as they alleged) having had independent advice, has been decided (*h*).

22. **Present practice.** — Under the present practice it is in many cases less expensive to determine the point in [*351] dispute in an action, or by originating *summons, than by the aid of the Trustee Relief Act, and in such cases a trustee ought not to adopt the more expensive process (*a*).

23. Under the new Rules of Court,¹ it is not obligatory on the Court to make an order for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without administration, and the Court usually refuses to make an order for general administration, unless satisfied that it is *necessary* for the protection of the trustees or execu-

(*d*) See *post*.

(*e*) *Wells v. Malbon*, 31 Beav. 48.

(*f*) Order 55, Rules 3 and 4, *et*

seq.: As to the parties to be served, see Rule 5.]

[(*g*) *Re Warren*, W.N. 1884, p. 112.]

[(*h*) *Re Garnett*, 50 L. T. N. S.

172; 32 W. R. 474.]

[(*a*) See observations of the late M. R. in *Re Birkett*, 9 Ch. D. 581.]

(¹) "Ord. 55, R. 10; as to the principles upon which the Court acts in the exercise of its discretion under this order, see *Re Wilson*, 28 Ch. D. 457."

tors (b); but an order for accounts and inquiries will be made under Order 15, if the circumstances of the case require it (c). But the Court will not direct the ordinary accounts under Order 15, where charges of breach of trust are made which may necessitate accounts being directed at the hearing on a different footing.¹

24. **Frame of the action.**—If an action be necessary it] may be instituted either by the trustee or by the *cestui que trust*; but in most cases an action is sustained rather than originated by the trustee. Whether the trustee be plaintiff or defendant, he should take care before an order is made, that all parties who have any colour of title are before the Court, for if the trustee fail in his duty to point out the proper parties, it might be held that the order of the Court under such circumstances did not indemnify him.

[If the trustee is plaintiff, and his accounts are directed to be taken, the conduct of the proceedings will be given to the defendants (d).]

25. **Plaintiff held to have no interest.**—Where the suit is commenced by a *cestui que trust*, and it is found at the hearing that upon the true construction of the instrument he has no interest in the fund, yet if the point was so doubtful that the fund could not have been distributed without the opinion of the Court, and *either* the fund is administered by the Court under the suit of the plaintiff, *or* the Court makes a declaration of the rights of the parties in the suit, the plaintiff will as a general rule have his costs (e). But where a plaintiff, instituting proceedings as claiming a contingent interest, obtains an order for taking the accounts in an administration suit, and pending the reference his interest ceases, and the parties interested instead of adopting repudiate the proceedings, the plaintiff cannot have his costs (f).

[(b) *Re Llewellyn*, 25 Ch. D. 66;
Re Dickinson, W. N. 1884, p. 199.]

[(c) *Borthwick v. Ransford*, 28
Ch. D. 79.]

[(d) *Allen v. Norris*, W. N. 1884,
p. 118; S. C. 27 Ch. D. 333.]

(e) *Westcott v. Culliford*, 3 Hare,

274, and cases there cited; *Turner v. Frampton*, 2 Coll. 336; *Boreham v. Bignall*, 8 Hare, 134; *Lee v. Delane*, 1 De G. & Sm. 1; *Merlin v. Blagrove*, 25 Beav. 134; *Wedgwood v. Adams*, 8 Beav. 103.

(f) *Hay v. Bowen*, 5 Beav. 610.

¹ *Re Gyhon*, 33 W. R. 620; 29 Ch. Div. 834.

26. **Alterations in practice.**—The Court, according [*352] to the old practice, could not have *made a mere *declaratory order* without consequential directions (*a*), and could not have administered the trust in the presence of *some only* of the parties interested, or as to a *part only* of the trust estate, or as to the rights of persons entitled under a will without taking preliminary *accounts*; but [under the present practice] the Court is authorised to make declaratory orders merely, as also to adjudicate on questions in the presence of some only of the persons interested, and as to part only of the trust estate, and without ascertaining the particulars or accounts of the property touching which the question has arisen (*b*).

27. **Special case.**—The opinion of the Court may also be obtained upon a special case [in the manner provided by] Sir George Turner's Act, 13 & 14 Vict. c. 35 (*c*); but where the parties are numerous, it is found in practice that much time is consumed, and expense incurred, in settling the case so as to meet the different views of the parties, and [it will generally be found a shorter and simpler course to issue a writ of summons, and then state the question in the form of a special case under Order 34 of the Rules of the Supreme Court, 1883.]

28. **St. Leonards' Act.**—By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 30, any trustee, executor, or administrator may, without suit by *petition* or by *summons upon a written statement at Chambers*, apply to the Court of Chancery for its opinion, advice, or direction upon any question respecting the management or administration of the trust property, or assets of the testator or intestate. By the Amendment Act, 23 & 24 Vict. c. 38, s. 9, the application is required to

(a) See *Daniel v. Warren*, 2 Y. & C. C. C. 292; *Shewell v. Shewell*, 2 Hare, 154; *Gaskell v. Holmes*, 3 Hare, 438; *Say v. Creed*, 3 Hare, 455.

(b) See Rules of the Supreme Court, 1883, Ord. 25, R. 5; Ord. 16, R. 9, 11; Ord. 34, R. 2; Ord. 55, R. 3. And see 15 & 16 Vict. c. 86, ss.

50 and 51, which have, however, been repealed by 46 & 47 Vict. c. 49.]

[(c) This Act is repealed by 46 & 47 Vict. c. 49, but by Ord. 34, R. 8, of the Rules of the Supreme Court, 1883, any special case may be stated for the same purposes, and in the same manner, as provided by the Act.]

be signed by counsel (*d*), and the Judge, where necessary, may require the attendance of counsel (*e*).

29. **Authority from the cestui que trust to receive the money.**— When the trustee is satisfied as to the parties rightfully entitled, he may pay the money either to the parties themselves, or to an agent empowered by them to receive it; and the authority need not be by *power of attorney*, or by *deed*, or even in *writing*. The trustee is safe if he can prove the authority, however *communicated. But [*353] a trustee would not be acting *prudently* if he parted with the fund to an agent without some document producible at any moment by which he could establish the fact of the agency.

30. **Genuineness of the authority.**— The trustee must look well to the *genuineness* of the authority, for if he pay to a wrong party it will be at his own peril. Thus, where A., possessed of 1000*l.* Million Bank stock, employed B., a broker, to receive the dividends for her, and B. *forged* a letter of attorney authorising him to sell the stock, and a sale was effected accordingly, it was decreed by Lord Northington that the company must bear the loss: for “a trustee,” he said, “whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust money; and if the transfer be made without the authority of the owner, the act is a nullity, and in consideration of law and equity the rights remain as before” (*a*).

31. **Forged mortgage.**— Where a trustee [handed over money to his solicitor for investment, and subsequently took] a supposed mortgage, but which, in fact, had been *forged* by the trustee’s own solicitor, and the trustee did not take all the precautions that he might have done (*viz.*, by calling for a receipt under the hands of the mortgagor for the money),

[*(d)* Notwithstanding the Judicature Act, 1873, and Ord. 19, R. 4, of the Rules of the Supreme Court, 1883, signature by counsel is still necessary. *Re Boulton’s Trusts*, 51 L. J. N. S. Ch. 493.]

(*e*) See *post*, chap. xxiii. s. 2, div. 4.

(*a*) *Ashby v. Blackwell*, 2 Eden, 299; *Sloman v. Bank of England*, 14 Sim. 475; *Eaves v. Hickson*, 30 Beav. 136; *Sutton v. Wilders*, 12 L. R. Eq. 373; and see *Harrison v. Pryse, Barn.* 324; *Ex parte Jolliffe*, 8 Beav. 168.

it was held that the loss must fall on the trustee, and was not to be borne by the trust estate, so as to fall upon the *cestui que trust* (b).

32. *Cestui que trust* abroad. — A *cestui que trust* is often abroad, and then the trustee cannot be sure that at the time of payment under the power of attorney the *cestui que trust* is alive, and if he were dead the power of attorney would be at an end (c). If, however, the *cestui que trust* give to the trustee a written direction by deed or otherwise [*354] to pay * money to a particular person, any payment made under such written direction, until it is revoked, and the revocation comes to the knowledge of the trustee, would be binding on the *cestui que trust's* executors (a). A convenient course in cases of this kind is to transmit the money to a Bank abroad, making it payable to the order of the *cestui que trust*; but where the *cestui que trust* is unable to receive his money in person, his direction had better be asked as to the particular mode of remittance to be adopted. Now, by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 26, a trustee paying under a power of attorney is expressly exempted from liability, notwithstanding the death of [or avoidance of the power by] the person who gave the power of attorney, provided the trustee did not know of such death

(b) *Bostock v. Floyer*, 1 L. R. Eq. 26; 35 Beav. 603. [“The *ratio decidendi* of the case was this, that it was not the ordinary course of business to place money in the hands of a solicitor to invest. It was not a specific investment, it was handed to the solicitor, and in that point of view the case is intelligible enough upon the ground that it was not right for the trustee to hand over the money to the solicitor for the purpose of investment,” per L. J. Lindley, *Re Speight*, 22 Ch. D. 727, 761;] and see *Hopgood v. Parkin*, 11 L. R. Eq. 75; *Sutton v. Wilders*, 12 L. R. Eq. 373.

[(c) Now by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 8, a power of attorney given for valuable consideration since the 31st De-

cember, 1882, and expressed to be irrevocable is not, in favour of a purchaser, revoked by anything done by the donor of the power without the concurrence of the donee, or by the death, marriage, lunacy, unsoundness of mind or bankruptcy of the donor; and by s. 9 a power of attorney whether for valuable consideration or not given since the 31st December, 1882, and expressed to be irrevocable for a fixed time not exceeding one year from the date of the instrument, is not, in favour of a purchaser, during the fixed time, revoked by any similar act or occurrence.]

(a) See *Vance v. Vance*, 1 Beav. 606; *Harrison v. Asher*, 2 De G. & Sm. 436; *Kiddill v. Farnell*, 3 Sm. & G. 428.

[or avoidance] at the time of payment (*b*); [and this has been extended by the Conveyancing and Law of Property Act, 1881, to cases of payments or acts made or done by any person in good faith since the 31st December, 1881, and applies whether "the donor of the power has died or become lunatic, of unsound mind or bankrupt, or has revoked the power," if the fact was not known to the donee of the power at the time of exercising it (*c*).]

33. **Letters of administration.** — If a legacy to a wife be a small sum, as under 50*l.*, and the husband survives her, the Court orders payment to him without taking out letters of administration to the wife (*d*); and, on the other hand, where the wife has survived, the Court has ordered a small sum, as a legacy of 13*l.*, to which the husband was entitled, to be paid to the widow, without taking out administration to the husband (*e*). But the Court refused to order payment to the husband, without letters of administration to the wife, of a sum of 80*l.*, and remarked that the husband was not liable after the wife's death for her debts contracted before marriage, and that the fund would get into a wrong channel (*f*). Where a married woman was entitled to a small sum under 50*l.*, representing *real* estate, the Court ordered it to be paid to her without a deed of acknowledgment (*g*). It is presumed that a trustee, acting in a *similar manner under similar circumstances, [*355] would be protected by the Court.

34. **Payment to an infant.** — A testamentary guardian has, by Act of Parliament (12 Car. 2, c. 24), the "custody, tuition and management of the infant's goods, chattels, and personal estate" [and this has generally been considered as not] authorising a trustee to pay to the guardian a *capital*

(*b*) But where the title of the person giving the power determines with his life, as in the case of a husband claiming in right of his wife, the difficulty seems insurmountable. See *Re Jones*, 3 Drew. 679.

[(*c*) 44 & 45 Vict. c. 41, s. 47.]

(*d*) *Re Jones' Trusts*, 1866, W. N. p. 65; *Hinings v. Hinings*, 2 H. & M. 32; *King v. Isaacson*, 9 W. R. 369.

(*e*) *Callendar v. Teasdale*, 3 W. R. 289.

(*f*) *Re Cabel*, 3 W. R. 280, reversing S. C. 3 W. R. 84.

(*g*) *Knapping v. Tomlinson*, W. N. 1870, p. 107; *Re Clarke's Estate*, 13 W. R. 401; [*Frith v. Lewis*, W. N. 1881, p. 145.]

sum to which the infant is entitled. [But under the corresponding Irish Act, 14 & 15 Car. 2, c. 19 (*Ir.*) it has been held that the receipt of the testamentary guardian for a legacy of the infant is a good discharge (*a*); and in a recent case in England, Fry, J., while refusing payment to the testamentary guardian of a legacy which had been paid into Court under the Legacy Duty Act (*b*), on the special ground that the testamentary guardian was not a "person entitled" within the meaning of that Act, intimated that he had no intention of interfering with the decision in the Irish case (*c*); and] where an infant *cestui que trust* represented himself to be of age, and induced the trustee to pay him, it was held that as the infant was old enough to commit a fraud, the trustee was not liable to him over again when he came of age (*d*).

35. **Lunatic.**—The mere appointment by the Court of the *committee of the estate* of a lunatic, would not justify a trustee in paying trust-money, to which the lunatic is entitled, to the committee of his estate, in the absence of any special power to receive conferred upon him by the Court.

36. **Payment to a partner.**—Where a debt is owing to a firm jointly the amount may be paid to the surviving partners without the concurrence of the representatives of the deceased partners (*e*).

37. **Payment to a single trustee.**—The Court will not, in the exercise of its discretion, except under special circumstances (*f*), pay out money to a single trustee who has survived his co-trustees (*g*); and a *trustee* out of Court would do well to throw all the protection he can about a trust fund: but it must not be inferred that he would not be *safe*

[(*a*) *M'Creight v. M'Creight*, 13 Ir. Eq. R. 314.]

[(*b*) 36 Geo. 3, c. 52, s. 32.]

[(*c*) *Re Cresswell*, 45 L. T. N. S. 468; 30 W. R. 244.]

(*d*) *Overton v. Banister*, 3 Hare, 503; and see *Wright v. Snowe*, 3 De G. & Sm. 321; *Nelson v. Stocker*, 4 De G. & J. 458.

(*e*) *Philips v. Philips*, 3 Hare, 289.

(*f*) *Re Courts of Justice Concentration (Site) Act*, 1865, W. N. 1867,

p. 148. In *Clark v. Fenwick or Fenwick*, W. N. 1873, p. 38, 21 W. R. 320, the Court ordered a sum of cash, the accumulation of income, to be paid to three out of four trustees, the fourth trustee being abroad.

(*g*) *Re Dickinson's Trust*, 1 Jur. N. S. 724; *Re Roberts*, 9 W. R. 758; and see *Baillie v. McKewan*, 35 Beav. 183; *Re Dickinson's Estate*, 3 I. R. Eq. 344; and note to s. 32 of *Trustee Act*, 1850, *post*, Appendix No. 2.

in paying to a single surviving trustee, for payment to a surviving trustee for *sale is of constant occurrence. [In cases of sales under the Settled Land Act, 1882, it must be borne in mind that sect. 39 expressly provides that capital money arising under that Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorises the receipt by one trustee (a).]

38. **Overpayment.** — If a trustee or executor has made an overpayment in error to a *cestui que trust* or legatee, he has a right to recoup himself out of any other interest in the trust fund of that *cestui que trust* or legatee (b).

39. **Repayment to executor.** — The Court will not generally, in favour of an executor, make an order on a legatee to refund *personally* (c); and it certainly will not make an order to refund to an executor who voluntarily and in spite of expression of doubts on the part of a legatee has made overpayments to the latter (d); and the Court will not, it seems, at the instance of an executor who is liable to a *creditor*, compel a *purchaser* from a legatee to refund (e). But an executor who has been made to pay a creditor, and has under his control a legacy appropriated by him as such, but not actually paid over, has been allowed to throw the debt upon the legacy (f), but is disentitled to his costs of obtaining relief (g). And an executor who has distributed assets amongst residuary legatees, with notice, not of an existing debt, but that a future debt might by possibility arise at a remote period, may if called upon to pay such debt recover back from the residuary legatees the amounts paid to them, but without interest (h).

40. **Rights of creditors.** — A *creditor* who is not barred by the Statute of Limitations, or to whose debt the statute is not pleaded, may recover assets from a legatee to whom they

[(a) See Garnett, Orme and Hargreaves' Contract, 25 Ch. D. 595.]

(b) Livesey v. Livesey, 3 Russ. 287; Dibbs v. Goren, 11 Beav. 483.

(c) Downes v. Bullock, 25 Beav. 54.

(d) Bate v. Hooper, 5 De G. M. & G. 338.

(e) Noble v. Brett, 24 Beav. 499.

(f) Noble v. Brett, 24 Beav. 499.

(g) S. C. (No. 2), 26 Beav. 233.

(h) Jervis v. Wolferstan, 18 L. R. Eq. 18.

have been erroneously paid by the executor (*i*), but not from purchasers for value, as from persons claiming under a marriage settlement (*j*); [and where the residuary estate had been assigned by the surviving executor to the residuary legatees, it was held by the Court of Appeal that a creditor might proceed against the residuary legatees without making the executor a party to the action (*k*). But a claim against

the executor personally for a *devastavit* in distributing the assets *without providing for the debt is barred after six years from the time of the *devastavit* (*a*); though he may be made liable after the expiration of that period, on the ground of breach of trust in an action to administer his testator's estate (*b*).]

41. **Rights of cestuis que trust.** — A *cestui que trust* may, notwithstanding the Statute of Limitations, if there has been no improper *laches*, recover from another *cestui que trust* an overpayment erroneously made to him by the trustee (*c*); and *residuary legatees*, plaintiffs in a suit, have been ordered to refund to unpaid particular *legatees* (*d*).

42. **Overpayment through misconduct of a cestui que trust.** — Where a trustee had paid to wrong parties upon the evidence of certificates which had been forged by one of the *cestuis que trust*, the Court not only compelled repayment by the wrong parties of what each had received, but also ordered the *cestui que trust* who had forged the certificates, to make up to the parties rightfully entitled, to the relief of the trustee, what should not be repaid (*e*); and in suits against trustees for breaches of trust, the Court has ordered a tenant for life who was *overpaid* by the breach of trust, to pay back to the trustees without the institution of *another suit* for the purpose (*f*).

(*i*) *Fordham v. Wallis*, 10 Hare, 217.

(*j*) *Dilkes v. Broadmead*, 2 Giff. 113; 2 De G. F. & J. 566; and see *Ridgeway v. Newstead*, 3 De G. F. & J. 474.

(*k*) *Hunter v. Young*, 4 Ex. D. 256.]

[(*a*) *Thorne v. Kerr*, 2 K. & J. 54; *Re Gale*, 22 Ch. D. 820.]

[(*b*) *Re Marsden*, 26 Ch. D. 783; *Re Baker*, 20 Ch. D. 230; *Re Birch*, 27 Ch. D. 622.]

(*c*) *Harris v. Harris* (No. 2), 29 Beav. 110.

(*d*) *Prowse v. Spurgin*, 5 L. R. Eq. 99.

(*e*) *Eaves v. Hickson*, 30 Beav. 136.

(*f*) *Hood v. Clapham*, 19 Beav. 90; and see *Brynard v. Woolley*, 20

43. **Settlement with one residuary legatee.**—If one of several residuary legatees receives only what is his fair share at the time, the subsequent wasting of the assets will not entitle the other residuary legatees to call upon him to refund; for if the executor renders his accounts to a residuary legatee and pays him his share, what right or business has such residuary legatee to interfere further in the matter of the administration of the estate? He cannot take proceedings for the administration of it; and, were he to do so, he would probably have to pay the costs. If so, why is he to suffer for the *laches* and neglect of the other residuary legatees, who have not required the executor to account to them or to pay over the balance in his hands or due from him (*g*). [But if any question of construction of the will is likely to arise as to any other share, which will involve costs which are properly payable out of the general estate, the trustee should retain a sufficient sum to protect himself against such costs (*h*).]

*44. **Release.**—On the final adjustment of the [*358] trust accounts it is usual for the trustee, on handing over the balance to the parties entitled, to require from them an acknowledgment that all claims and demands have been settled (*a*). It is reasonable, that when the trustee parts with the whole fund, and so denudes himself of the means of defence, he should be placed by the party receiving the benefit in the utmost security against future litigation. But a receipt in full of all claims extends only to all claims that are then known (*b*).

In practice it is usual to require a release under seal, for although an acquittance of this kind *may* be opened by the *cestui que trust* on showing fraud, concealment, or mistake,

Beav. 583; *Davies v. Hodgson*, 25 Beav. 177; *Griffiths v. Porter*, 25 Beav. 236. As to overpayment to a *feme covert*, whose anticipation is restrained, see *Moore v. Moore*, 1 Coll. 54. As to a wrong payment to one *cestui que trust* by arrangement with another *cestui que trust*, see *Rogers v. Ingham*, 3 Ch. D. 351.

(*g*) *Peterson v. Peterson*, 3 L. R. Eq. 111; see 114.

[(*h*) *Re Potts*, W. N. 1884, p. 106.]

(*a*) See — *v. Osborne*, 6 Ves. 455; but *query* if the *release* spoken of was not a *conveyance*.

(*b*) *Eaves v. Hickson*, 30 Beav. 142.

it is *prima facie* a solemn, simple, and valid defence, and throws on the releasor the heavy *onus* of displacing it (c). In strict right, however, a trustee in the absence of special circumstances cannot insist upon a release under seal (d). But it has been held that an *executor*, though he cannot insist on a release from a pecuniary legatee (e), yet on the estate being wound up, has a right to a release from the residuary legatee (f).

King v. Mullins. — In one case (g), where the trust was by parol for A. for life, and on her death for B. and C., and the costs of the suit depended on the question whether the trustee ought, as required, to have transferred the sums on the joint receipt of A., B. and C., or whether he was right in refusing, unless they executed a release under seal, Vice Chancellor Kindersley decided that the trustee was entitled to a release on the grounds, first, that the trust was by parol, and secondly, that the time of payment, according to the tenor of the deed, was anticipated, as the tenant for life was still living. These reasons are not satisfactory. The circumstance that the trust was by parol, and therefore obscure, might have been an excuse for not paying at all, or ground for demanding an indemnity; but seems to afford no reason for requiring a release under seal, as distinguished from a simple receipt or acquittance in writing. Neither does the anticipation of the time appear to be material, for A., B. and [359] C. were admitted to be the only *cestuis que *trust*, and their concurrence in the receipt was equivalent to a reduction into possession (a).

In another case, V. C. Wood observed, that every trustee had a right to have some sort of a discharge, perhaps not a *release*, unless the trust was created by an instrument *under*

(c) See *Fowler v. Wyatt*, 24 Beav. 232.

(d) *Chadwick v. Heatley*, 2 Coll. 137; *Fulton v. Gilmour*, Hill on Trustees, 604; *Re Wright's Trust*, 3 K. & J. 421; *Warter v. Anderson*, 11 Hare, 303; *Re Cater's Trust*, 25 Beav. 366; *Foligno's Mortgage*, 32 Beav. 131.

(e) *Re Fortune's Trust*, 4 I. R. Eq. 351.

(f) *King v. Mullins*, 1 Drew. 311.

(g) *King v. Mullins*, Vice Chancellor Kindersley, 21st Dec. 1852, M. S.; 1 Drew. 308.

[(a) See *Anson v. Potter*, 13 Ch. D. 141.]

seal (b). But no such distinction has ever yet been made, and V. C. Kindersley, as we have seen, required a release because the trust was by *parol*.

[45. **Property falling in after release.**—A release of the executors and the estate of the testator given by a pecuniary legatee on payment of part of his legacy, on the footing of the estate being insufficient for payment of the legacies in full, will not enure for the benefit of the residuary legatee, if, by reason of additional funds falling in, the estate subsequently becomes sufficient to make a further payment to the legatees (*c*).]

46. **Release from trustees to trustees.**—The trust fund is not unfrequently transferred from the trustees of an old settlement to the trustees of a new settlement, and the trustees of the old settlement insist on a general release before they will part with the fund, while, on the other hand, the trustees of the new settlement feel a reluctance to give more than a simple receipt. The requisition of the trustees of the old settlement has usually been complied with, but perhaps it could not be enforced (*d*). Of course, the trustees of the new settlement cannot be called upon to enter into any covenant of indemnity.

47. **Expense of the release.**—As the party to benefit by the deed is, in general, the one to prepare it, the release will be drawn by the solicitor of the trustee. Another reason would be that the trustee has the necessary documents in his possession. The expense must be paid out of the trust fund.

48. **Order of the Court.**—When a trustee pays money under the direction of the Court, he is indemnified by the order itself, and is not entitled to any release from the parties (*e*). It would be impossible to hold a trustee answerable

(*b*) *Re Wright's Trust*, 3 K. & J. 421; and see *Re Cater's Trusts*, 25 Beav. 366.

[(*c*) *Re Ghost's Trusts*, 49 L. T. N. S. 588.]

(*d*) *Re Cater's Trusts*, 25 Beav. 366.

(*e*) See *Waller v. Barrett*, 24 Beav. 413; *Gillespie v. Alexander*, 3 Russ.

137; *Underwood v. Hatton*, 5 Beav. 39; *Farrell v. Smith*, 2 B. & B. 337; *Fletcher v. Stevenson*, 3 Hare, 370; *Knatchbull v. Fearnhead*, 3 M. & Cr. 126; *David v. Frowd*, 1 M. & K. 209; *Sawyer v. Birchmore*, 1 Keen, 401; *Smith v. Smith*, 1 Dr. & Sm. 384; *Bennett v. Lytton*, 2 J. & H. 155; *Williams v. Headland*, 4 Giff. 495; Eng-

ble for an act not done by himself, but by the Court. It is the duty, however, of the trustee to fully inform the Court of all the material facts within his knowledge, and if [*360] he *improperly withheld them, he would be made responsible for the results of his suppression of facts.

[49. Where a settlement is executed in contemplation of an intended marriage, which is never solemnized, or of a marriage which is annulled on the ground of impotency, the trustees of the settlement will be ordered to reconvey the trust property to the settlor discharged from the trusts (a).]

50. 36 Geo. 3, c. 52. — By 36 G. 3, c. 51, s. 32, *executors and administrators*, where legatees or next of kin are *infants*, or *beyond seas*, may pay the legacies or shares into Court (b), and by 45 G. 3, c. 28, s. 7, the provisions of the former Act are extended to trustees and owners of *real estate* charged with *legacies*.

51. 10 & 11 Vict. c. 96. — By 10 and 11 Vict. c. 96, entitled "An Act for better securing trust funds and for the relief of trustees," it is enacted:

I. That all *trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust whatever*, or the major part of them, shall be *at liberty on filing an affidavit shortly describing the instrument creating the trust*, to pay the same into the Bank of England, to the account of the *particular trust*, subject to the order of the Court of Chancery, and that all trustees or other persons having any *annuities or stocks* of the Bank of England, of the East India Company, or South Sea Company, or any Government or Parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trust, or the

land v. Lord Tredegar, 35 Beav. 256; Lowndes v. Williams, 24 L. T. N. S. 465.

[(a) Essery v. Cowlard, 26 Ch. D. 191; Addington v. Mellor, 33 W. R. 232.]

[(b) It has been held that under this Act it is the duty of executors to pay an infant's legacy into Court, and that they are not justified in invest-

ing the legacy in Consols and accumulating it at compound interest, Rimell v. Simpson, 18 L. J. N. S. Ch. 55; but it may well be doubted whether this decision would now be followed, as a trustee may properly deal with a fund out of Court in the same manner as the Court would have dealt with it if under its control.]

major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the Accountant-General (c), with his privity, in the matter of the particular trust subject to the orders of the said Court, and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or the certificate of the proper officer of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited.

* II. That *such orders as shall seem fit* shall from [*361] time to time be made by the Court of Chancery in respect of the trust moneys, stocks, funds or securities so paid in, transferred and deposited as aforesaid, and for the investment and payment of any such moneys, or of any dividends or interest on any such stocks or securities, and for the transfer or delivery out of any such stocks and securities, and for the administration of any such trusts generally *upon a petition* to be presented in a summary way; and service of such a petition shall be made on such persons as the Court shall direct; and every order made upon any such petition shall have the same effect as if the same had been made in a suit regularly instituted; and if it shall appear that any such trust funds cannot safely be distributed without the institution of one or more suit or suits, the Court may direct any such suit or suits to be instituted.

52. 12 & 13 Vict. c. 74. — This Act did not enable the *major part* of trustees to pay in or transfer a fund where the other trustees had a *legal control over the fund and would not concur*. But by 12 & 13 Vict. c. 74, it was enacted, that where moneys, annuities, stocks, or securities were vested in persons as trustees, executors, administrators, or otherwise, and the *major part of them* were desirous of transferring the funds into Court under the Trustees Relief Act, the Court, on a *petition* presented under the said Act for that purpose, might direct the transfer by the major part, without the concurrence of the rest, and might make an order on the necessary parties to permit such a transfer.

(c) Now the Paymaster General; see 35 & 36 Vict. c. 44, ss. 4, 6.

The decisions upon these important Acts, and the General Orders relating to them, will be found separately considered in the Appendix.

53. **Payment to official trustees of charities.**—By 18 & 19 Vict. c. 124, s. 22, any trustee or other person having stock or money in his hands for a *charity* may, by an order of the Board of Charity Commissioners, transfer the stock or pay the money to the *Official trustees* of charitable funds, and such payment or transfer will be an indemnity to the person paying or transferring.

54. **Payment into County Court.**—By 30 & 31 Vict. c. 142, s. 24, trust funds not exceeding 500*l.* in amount or value may, if *money*, be paid into the *Post Office Savings Bank* of any county court town, in the name of the registrar of such Court, or, if *stock or securities*, be transferred into the joint names of the *treasurer and registrar* of such Court.

55. **Protection against creditors, &c.**—Trustees who are also *executors* may be embarrassed as to the distribution of the trust fund, not merely by the difficulty in [*362] *ascertaining who are their *cestuis que trust*, but by reason of the possible existence of paramount claims on the part of creditors or others.

Turner's Act.—To meet this difficulty provision was made by Sir George Turner's Act (*a*) for directing a reference, upon *motion* or *petition* of course, to inquire whether there were any outstanding debts or liabilities affecting the estate of any deceased person, and for enabling the personal representative to distribute the estate subject to the result of the inquiry, without the cost of a *general administration* under the direction of the Court; and by a more recent enactment, the benefit of these provisions might be obtained by summons at chambers (*b*).

56. **Lord St. Leonards' Act.**—By Lord St. Leonards' Act (*c*), even the necessity of an application to the Court under that of Sir George Turner was in most cases rendered unnecessary, it being by Lord St. Leonards' Act in substance enacted that *executors* and *administrators*, after giving such

(*a*) 13 & 14 Vict. c. 35, ss. 19–25.

(*c*) 22 & 23 Vict. c. 35, s. 29.

(*b*) 23 & 24 Vict. c. 38, s. 14.

notices for creditors and others (*d*) to send in their claims as would have been given by the Court of Chancery, may at the expiration of the time named in the notices proceed to distribute the estate, without being liable for any claim of which they *shall not have had notice* at the time of distribution (*e*). [And the above provisions in Sir George Turner's Act, and the amending Act, have since been repealed (*f*).]

57. **Jurisdiction of County Courts.**—By 28 & 29 Vict. c. 99, administration suits and suits for the execution of trusts and proceedings under the Trustees Relief Act, or the Trustee Acts, may be instituted in the *County Courts* where the *value does not exceed 500l.* (*g*)

(*d*) This includes the claims of next of kin under an intestacy, *Newton v. Sherry*, 1 C. P. D. 246.

(*e*) Sums appropriated by executors and retained by them as trustees are moneys distributed and cease to be assets, *Clegg v. Rowland*, 3 L. R. Eq. 368. Executors, to entitle themselves to the protection of the Act, must insert advertisements in the *London Gazette*, as well as in local papers, *Wood v. Weightman*, 13 L. R. Eq. 434; and executors after dis-

tribution are bound to give all proper information to unpaid creditors, or they will be deprived of their costs in suits by such creditors, *In re Lindsay*, 8 I. R. Eq. 61.

[(*f*) 46 & 47 Vict. c. 49.]

(*g*) The County Courts Acts Amendment Act, 30 & 31 Vict. c. 142, s. 8, [and 36 & 37 Vict. c. 66, s. 67, enable] parties to apply at chambers for transfer of a suit pending in the High Court, affecting property not exceeding 500*l.* to a County Court.

THE DUTIES OF TRUSTEES OF RENEWABLE LEASEHOLDS.

UPON this head we propose — I. To examine the preliminary question, in what cases the obligation to renew is imposed by the settlement. II. To inquire in what manner the trustees are to levy the fines payable upon the renewals.

I. In what cases the obligation to renew is imposed by the settlement.¹

1. **Settlement of leaseholds does not per se imply a direction to renew.** — It might naturally be supposed, that, from the very circumstance of the leaseholds being of a renewable character, a settlement of them to several persons in succession would *per se* imply a right in the remainderman to call upon the tenant for life to contribute to the fine (*a*); and indeed Lord Thurlow, in the instance of a lease which had not previously been treated as renewable, observed, "The cases in which the *nature of the estate* or the will of the testator compels a renewal, appear not to apply to the present: where there is *no such custom*, or direction, it is in the discretion of the tenant for life to renew or not" (*b*). However, it seems to be now established generally, that, in a device of renewable leaseholds *without the interposition of a trustee*,

(*a*) See *White v. White*, 4 Ves. 32.

(*b*) *Nightingale v. Lawson*, 1 B. C. C. 443.

¹ *Renewal of leases.* — In America there are no fees or fines attending either the making or the renewal of leases, so that much of what is important in England in reference to leases is of no consequence here. The right to renew a lease is capable of sale and conveyance; *Anderson v. Lemon*, 8 N. Y. 236; *Phyfe v. Wardell*, 5 Paige, 268. The trustee must renew a lease, if at all, for the benefit of the trust estate, and he cannot take it in his own name, and for his own advantage, even if it is impossible to get it for the benefit of the trust; *Galbraith v. Elder*, 8 Watts, 81; *Holridge v. Gillespie*, 2 Johns. Ch. 33; *Fisk v. Sarber*, 6 Watts & S. 18; *M'Clanahan v. Henderson*, 2 A. K. Marsh. 388; and if they do renew in any name, it inures to the benefit of the trust; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Smiley v. Dixon*, 1 Pa. 439.

the remainderman cannot oblige the tenant for life to contribute to the fine (c); and so it was determined even where the devise was expressly made, "subject to the payment of all *fin*es, and as they became due yearly and for every year" (d). However, as the interest given is in its nature capable of renewal, the Court says, "If the tenant for life do renew, he shall not by converting the new acquisition to his own use derive an unconscientious benefit out of the estate" (e); but on the remainderman's *contributing [*364] to the fine, shall be regarded as a trustee, and shall hold the renewed interest upon the trusts of the settlement (a).

2. **Whether a direction to renew be implied by the interposition of a trustee.**—Will the *interposition of a trustee* sufficiently indicate an intention of obliging the tenant for life to renew? "In a *devise to trustees*," says Lord Hardwicke, "If *cestui que trust* for life be one of the lives, I should doubt whether such *cestui que trust* could be compellable to contribute; but here all these lives were strangers; *the intent of the testator certainly was, that the lease should continue, and be kept on foot, and something must be done for a renewal, though nothing is mentioned*" (b). Lord Alvanley on one occasion alluded to the point, but said he was not called upon to decide it (c). In *Hulkes v. Barrow* (d), where the devise was to trustees upon trust to permit one to receive the rents for life, with remainders over, "subject to the payments of the rents and performance of the covenants reserved and contained, *or to be reserved and contained*, in the present or *future* leases, whereby such premises were or *should be* held, and also all taxes, *fin*es, and expenses attending the premises," it was held that the obligation of renewing the lease was imposed by the will. And in *Lock v. Lock* (e), where a

(c) *White v. White*, 4 Ves. 32, per Lord Alvanley; 8. C. 9 Ves. 561, per Lord Eldon; *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow.

(d) *Capel v. Wood*, 4 Russ. 500.

(e) *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow.

(a) *Nightingale v. Lawson*, 1 B. C.

C. 440; *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Fitzroy v. Howard*, 3 Russ. 225.

(b) *Verney v. Verney*, 1 Ves. 429.

(c) *White v. White*, 4 Ves. 33.

(d) *Taml.* 264.

(e) 2 Vern. 666.

testator had devised a college lease of twenty-one years to his wife for life, remainder to her son, she paying 10*l.* per annum to her son *during her life*; it was ruled, that, as the testator contemplated the continuance of the lease during the life of the wife, she was bound to renew. These, however, were cases accompanied with special circumstances. It has since been decided by Lord Plunket, in Ireland, that a settlement with the *mere interposition of a trustee* does not impose an obligation to renew (*f*).

3. **Whether implied in a marriage settlement.** — Where leaseholds of this kind are made the *subject of a marriage settlement*, it may be argued, that as the parents and issue who have any interest given them are *purchasers for value*, the enjoyment of the tenant for life should be consistent with that of the other subsequent takers. But in *Lawrence v. Maggs* (*g*), the case of * a marriage settlement with trustees interposed, but without any mention of renewals, Lord Northington was apparently of opinion that the tenant for life was *not* bound to renew.

4. **Implied in articles for a settlement.** — If renewable leaseholds upon marriage be *articled to be settled*, the Court will, in executing the settlement, insert the proper direction for renewals. This, it seems, was directly determined in *Graham v. Lord Londonderry* (*a*): and the case of *Lawrence v. Maggs*, before Lord Northington, was cited before Lord Thurlow in *Pickering v. Vowles* (*b*), as establishing the same doctrine; but it appears by the report taken from Lord Northington's own MS. that the Bar were mistaken in

(*f*) *O'Ferrall v. O'Ferrall*, L*i.* & G. Rep. temp. Plunket, 79. In *Trench v. St. George*, 1 Dru. & Walsh, 417, before the same Judge, it is not clear whether his Lordship did or not consider the will as creating an obligation to renew, but it would rather appear that he did. The remainderman was held not liable to contribute towards the renewal fines in favour of the tenant for life, except as respected certain fines paid subsequently to 1810, as to which the remainderman

submitted to contribute. See pp. 454-456.

(*g*) 1 Eden, 453. Search has been made for this case in R. L. through several years, but the decree has not been found. See *Lord Montfort v. Cadogan*, 17 Ves. 488, S. C. 19 Ves. 638; *Trench v. St. George*, 1 Dru. & Walsh, 417.

(*a*) Cited *Stone v. Theed*, 2 B. C. C. 246.

(*b*) 1 B. C. C. 197. The cause does not appear in R. L.

this (c). However, Lord Thurlow himself seems to have entertained that opinion, for in the same case of *Pickering v. Vowles*, where the property was articted to be settled, but there was no direction for renewals, his Lordship said, "It was *intended* the lease should be fully estated, and that the husband and wife should have life estates, and that so fully estated it should go to the children."

5. *Of discretionary renewals.* — A direction for renewals where successive estates are limited is sometimes in the form of a *discretionary* power. The instrument *may*, indeed, be so specially worded, that the power should be perfectly arbitrary; but if the proviso be simply that "it shall be lawful for the trustees to renew, from time to time, as occasion may require, and as they may think proper," the clause will be construed, not as conferring an option upon the trustees of renewing or not, but as a safeguard against any unreasonable demands on the part of the lessor (d).

6. *23 & 24 Vict. c. 145.* — By an Act passed 28th August, 1860, trustees (under instruments of trust executed since the date of the Act) of leaseholds *renewable by contract, or custom, or usual practice* are *authorised* in the exercise of their discretion, and, if so *required* by any person beneficially interested, are *bound as a duty*, to use their best endeavours to renew; but the Act is not to apply, where by the *terms of the settlement or will*, the person in possession for his life or other limited interest is entitled to enjoyment *without any obligation to renew the lease*, or to *contribute to the expense of renewal*; and the Act where it applies enables the trustees to pay the expense out of any monies in their hands held upon similar trusts, or to raise * the same by [*366] mortgage (a). [This enactment has since been repealed (b), but the repeal is not to affect any right accrued or obligation incurred before the commencement of the Repealing Act, 31st December, 1882, and is not to affect

(c) 1 Eden, 453.

(d) *Milsington v. Mulgrave*, 3 Mad. 491, 5 Mad. 472; *Mortimer v. Watts*, 14 Beav. 416; and see *Verney v. Verney*, 1 Ves. 430; *Harvey v. Harvey*,

5 Beav. 134; *Luther v. Bianconi*, 10 Ir. Ch. Rep. 203.

(a) 23 & 24 Vict. c. 145, ss. 8 & 9.

[(b) 45 & 46 Vict. c. 38, s. 64.]

any operation, effect, or consequence of any instrument executed or made before the same date. The powers and obligations to renew under instruments which came into operation before 31st December, 1882, are accordingly unaffected by this repeal and are still in force.]

7. 23 & 24 Vict. c. 124. — By another Act, also passed 28th August, 1860, where any estate or interest under any lease or grant from an *ecclesiastical corporation*, is vested in a person as trustee, whether expressly or by implication of law, with a power to raise money for procuring a renewal, or where such power is vested in any person, it is made lawful for such person to raise money for the purpose of purchasing the reversion or otherwise enfranchising the property (*c*); and it has been held that this enactment confers a power not only to raise the money, but also to effect the purchase or enfranchisement (*d*). But this will not authorise the trustees to make any arrangement with the reversioners which will disturb the relative rights of the tenant for life and the remaindermen under the settlement; and where it was proposed to surrender part of the leaseholds in consideration of a release of the reversion of the rest of the leaseholds, and the interests of the tenant for life would suffer by the arrangement, the Court had no power, without the consent of the tenant for life, to give effect to the proposal, though beneficial on the whole (*e*).

II. **How fines on renewals to be levied.** — We next proceed to inquire in what manner the fines for renewals are to be levied by the trustees.

Upon this subject we shall advert, *First*, to the case where the settlor himself has specifically marked out the fund from which the fines are to be raised, and *Secondly*, to the rules adopted by the Court, where the settlor himself has omitted to declare any intention.

(*c*) 23 & 24 Vict. c. 124, s. 20.

(*d*) *Hayward v. Pile*, 5 L. R. Ch. App. 218, *per* Lord Hatherley.

(*e*) *Hayward v. Pile*, 5 L. R. Ch. App. 214. But in another special case where there was an absolute

trust for renewal, overriding the interest of the tenant for life, the Court made the order, *Hollier v. Burne*, 16 L. R. Eq. 163; [See *Maddy v. Hale*, 3 Ch. D. 327; *Re Lord Ranelagh's Will*, 26 Ch. D. 591.]

First. Where the fund for the fines is pointed out.

1. How to be levied out of "*rents, issues, and profits*," where the leases are for years. — If there be an express trust to provide the fines for renewals out of the "*rents, issues, and profits*," and the leaseholds are *terms of years not determinable on lives*, so that the times of renewal can * be [*367] certainly ascertained, it will be the duty of the trustees to lay by every year such a proportion of the annual income as against the period of renewal will constitute a fund sufficient for the purpose (a).

2. Fines to be levied out of *rents and profits*, or by mortgage. — If the trust be to levy the fines for renewal out of the "*rents, issues, and profits, or by mortgage*," it was held in a case before Sir J. Leach that the annual rents only would in the first instance be applicable, for he considered the authority to mortgage not as making it optional with the trustees whether they should or not affect the interests of the remainderman, by throwing the charge of the renewal upon the *corpus* of the property, but as given for the protection of the *cestuis que trust* in case the amount of the fine should not be otherwise forthcoming (b), and intimated that should the trustees be under the necessity of mortgaging, the Court would call back from the party in possession the amount of the incumbrance thus temporarily incurred (c). However, in the later case of *Jones v. Jones* (d), where the trustees were empowered to levy the fines "*by and out of the rents, issues, and profits, or by mortgage, or by such other ways and means as should be advisable*," the Court, after observing that to levy the fines from the rents would throw them on the tenant for life, while a mortgage would be oppressive to the remainderman, declined to give any opinion whether the trustees might not, had they exercised their discretion, have determined upon whom the burthen should fall; but as the trustees had not exercised their discretion, it was held that

(a) *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; S. C. 19 Ves. 635; see *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121; *Blake v. Peters*, 1 De G. J. & S. 345.

(b) *Milaintown v. Earl of Port-*

more, 5 Mad. 471; and see *Milles v. Milles*, 6 Ves. 761.

(c) 5. Mad. 472; and see *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121, 123.

(d) 5 Hare, 440.

the Court could adjust the *onus* amongst the parties according to the equitable rule, viz. in proportion to their actual enjoyment, as soon as it could be ascertained (*e*). And in *Greenwood v. Evans* (*f*), *Reeves v. Creswick* (*g*), and *Ainslie v. Harcourt* (*h*), where the fines were to be raised out of the *rents, issues, and profits*, or *by mortgage*, the Court in like manner adopted the principle of throwing the *onus* on the successive tenants of the estate, in proportion to their enjoyment (*i*). In the first two cases the *leaseholds were*

[*368] *for lives*, and in the last the leaseholds were * partly *for lives* and partly *for years*, but no distinction was taken on that account. The present leaning of the Courts would appear, therefore, to be, to consider the language of the instrument, as directing only the temporary mode of raising the fines, without prejudice to the ultimate equitable adjustment according to the principles now acted upon in equity in ordinary cases. But if the trusts be to pay the renewal fines by and out of "the *annual rents, issues, and profits*," with a *power*, if the money wanted for renewal be not produced, to raise it by mortgage, the *onus* will fall upon the tenant for life (*a*).

3. **How to be levied when the leases are for lives.**—If the leaseholds be either *for lives* or *for years determinable on lives*, and the trust is to raise the fines for renewal out of the "*rents, issues, and profits*," the expenses of renewal must still be cast upon the *annual rents*, if it *clearly appear* that such were meant, though from the *uncertainty of the time*, the trustees cannot be sure they shall have accumulated an adequate fund.

4. **Whether rents and profits mean annual rents.**—But the expression "*rents, issues, and profits*," often stands by itself, without any sufficient indication *aliunde* that *annual rents* are intended, and then the question arises, and is attended with great difficulty, whether the fines shall be raised out of the *annual rents* or the *corpus*.

(*e*) *Jones v. Jones*, 5 Hare, 440.

(*h*) 28 Beav. 313.

(*f*) 4 Beav. 44.

[(*i*) See *Isaac v. Wall*, 6 Ch. D.

(*g*) 3 Y. & C. 715, as corrected from Reg. Lib.; see note (*a*); p. 369.

706; *Re Marquess of Bute*, 27 Ch. D. 196.]

(*a*) *Solly v. Wood*, 29 Beav. 482.

Stone v. Theed.—In *Stone v. Theed* (*b*), Lord Thurlow held that *annual* rents only were applicable. In *Allan v. Backhouse* (*c*) Sir T. Plumer considered that the trustees might sell or mortgage, and that the tenant for life and remainderman must contribute in the usual proportions, and this decision was affirmed on appeal by Lord Eldon (*d*). In *Shaftesbury v. Marlborough* (*e*) Sir J. Leach observed upon the conflict between the preceding cases, and followed the authority of Lord Thurlow. [In *Re Barber's Settled Estates* (*f*), the authority of *Allan v. Backhouse* was conceded without argument.]

The decisions in *Playters v. Abbott* (*g*) and *Townley v. Bond* (*h*), must be viewed as resting only upon the special wording of the instruments which were under consideration.

Greenwood v. Evans, &c.—In *Greenwood v. Evans* (*i*), *Jones v. Jones* (*j*), *Reeves v. *Creswick* (*a*), and [*369] *Ainslie v. Harcourt* (*b*), the trustees were empowered to levy the fines from the *rents, issues, and profits*, or by *mortgage*, and the Court, as we have seen, apportioned the burthen amongst the successive tenants, according to their enjoyment.

(*b*) 2 B. C. C. 243; see the case stated from Reg. Lib. with some remarks, in *Jones v. Jones*, 5 Hare, 451, note (*a*); and see *Metcalf v. Hutchinson*, 1 Ch. D. 591.

(*c*) 2 V. & B. 65.

(*d*) Jac. 631. [A full copy of Lord Eldon's judgment will be found in the *Law Magazine*, vol. 26, p. 112.]

(*e*) 2 M. & K. 111.

[(*f*) 18 Ch. D. 624.]

(*g*) 2 M. & K. 97.

(*h*) 2 Conn. & Laws. 398.

(*i*) 4 Beav. 44.

(*j*) 5 Hare, 440.

(*a*) 3 Y. & C. 715. It is stated in the report that "there were no funds provided for the purpose of renewal by the testator's will;" from which it might be supposed that the will was altogether silent upon the subject, but Mr. Shapter, Q. C., who had occasion to consult the Reg. Lib. obligingly furnished the author with the

following extract from the will: "It shall be lawful for my said trustees, and the survivor of them, and the heirs, executors, administrators and assigns respectively of such survivor to renew, or use their or his endeavours to renew, the leases for the time being of such part of my said estates as shall be accustomedly renewable from time to time and as often as occasion shall require, and for that purpose to make such surrenders of the then leases, or any renewed leases, as shall be requisite and necessary in that behalf, and *by and out of the rents, issues, and profits*, of the premises, the leases whereof may be so renewed, or by *mortgage thereof*, to raise so much monies as shall be sufficient for paying the several renewal fines and other necessary charges for such renewals."

(*b*) 28 Beav. 313.

Result of the cases. — The result appears to be that where the direction is to raise the fines out of “the rents, issues, and profits,” simply, the Court may be compelled, by the express language of the instrument, to throw the fines upon the *annual* rents, but will lean strongly against such a construction, and where the trustees are empowered to raise the fines out of “the rents, issues, and profits, *or* by mortgage,” it will hold the discretion to apply only to the temporary means of raising the fund, and will apportion the burthen according to the general rule (*c*).

5. **Of raising the fines by way of insurance.** — On a reference to the Master in Chancery by Sir J. Leach, how a fund for payment of fines on the renewal of leaseholds for *lives*, where the fines were to be paid from the *annual* rents, could best be secured, the Master proposed in his report, that each of the lives, upon which the leases were held, should be insured *against the life of the tenant for life* in a sum sufficient to cover the amount of the fine, and that the premiums upon the policies should be paid out of the annual rents and profits (*d*). Upon this arrangement we must remark that the lives of the *cestuis que vie* ought to have been insured *unconditionally*, and not against the life of the tenant for life, for the estate was continually deteriorating as the lives wore out, and the remainderman was entitled to have good lives or equivalent insurances. In leaseholds for years, the remainderman has a right to a proportional accumulation towards the payment of the next fine, and why is not the same principle to prevail in the case of leaseholds for [*370] lives? Subject to this observation, a * more convenient mode of raising the fines could not perhaps be suggested, and a trustee under similar circumstances would scarcely incur a risk in acting upon it at his own discretion.

6. **Power to charge freeholds for raising fines.** — Where freeholds and leaseholds for lives are limited to the same uses, it is usual, from the difficulty of mortgaging leaseholds vested

[*c*] See *Re Marquess of Bute*, 27 Ch. D. 196.]

[*d*] *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 124; and see *Greenwood v. Evans*, 4 Beav. 44.

in trustees (who will not covenant beyond their own acts), to insert a power to charge the *freeholds* for raising the fines; and it would be well to provide that the freeholds and leaseholds might be joined together in the security, and that the loan should precede other charges created by the settlement, and that the *corpus* of the property should be subject to the mortgage, so as to shut out the question of apportionment between the tenant for life and the remainderman.

7. **Who shall have the accumulations where renewal cannot be had.**— [Where there is an absolute trust for renewal of leaseholds out of the rents and profits over-riding the interest of the tenant for life, but from the unwillingness or incapacity of the lessor no renewal can be obtained, it is the duty of the trustees to make the best arrangement which is practicable for rendering the property permanent for the benefit of the persons successively entitled, either by purchasing the reversion where this can be done on advantageous terms, and with a due regard to the interests of the successive *cestuis que trust*, or by converting the leaseholds and investing the proceeds, allowing the tenant for life only the income of the investments during his life (a); but where no such absolute trust for renewal exists, although] a portion of the annual rents and profits may have been destined by the settlor to defray the expenses of renewals, if no renewal can be obtained, the sums which would have been raised will be regarded as a charge which fails of taking effect, and will merge for the benefit of the tenant for life (b).

8. **Who must compensate the remainderman where no renewal has been made.**— If a trustee (c), or tenant for life in the situation of a trustee (d), fail in his duty to apply the given fund, the remainderman may call for a compensation from

[(a) *Maddy v. Hale*, 3 Ch. D. 327; *In re Wood's Estate*, 10 L. R. Eq. 572; *Hollier v. Burne*, 16 L. R. Eq. 163; *Re Barber's Settled Estates*, 18 Ch. D. 624; *Re Lord Ranelagh's Will*, 26 Ch. D. 590.]

(b) *Morris v. Hodges*, 27 Beav. 625; *Richardson v. Moore and Tardiff v. Robinson*, cited *Colegrave v. Manby*, 6 Mad. 82, 83, and reported 27

Beav. 629; *In re Money's Trusts*, 2 Dr. & Sm. 94. See *Colegrave v. Manby*, 6 Mad. 86, 87, 2 Russ. 262; *Bennett v. Colley*, 5 Sim. 181, 2 M. & K. 231; *Browne v. Browne*, 2 Giff. 304.

(c) *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; S. C. 19 Ves. 635; and see *Wadley v. Wadley*, 2 Coll. 11.

(d) *Colegrave v. Manby*, 6 Mad. 72; S. C. 2 Russ. 238.

such trustee, or tenant for life, or their assets. But when, by the permission of the trustee, the tenant for life has [*371] been in the full enjoyment of the rents and * profits without deduction for renewals, though the trustee is primarily answerable to the remainderman, yet the tenant for life, who has had the actual pernanacy, must to that extent make it good to the trustee (a).

9. *Of fines on underleases.* — And where the leaseholds were annually renewable for twenty-one years, and the custom had been for the lessee annually to grant underleases for twenty years, the tenant for life, as bound to pay the fines to the lessor out of the annual rents and profits, was declared entitled to the fines paid annually by the underlessees (b).

How fines to be levied where no direction by the settlor. — *Secondly.* It often happens that renewable leaseholds are devised to trustees with a direction, either expressed or implied, to keep the leases continually renewed, but *without any declaration of intention* out of what fund the settlor meant the expenses to be levied.

1. *Where paid by tenant for life or remainderman.* — Where this is the case, the tenant for life and remainderman may possibly agree to contribute towards the fine out of their own pockets, at the time of the renewal; or if the tenant for life and remainderman cannot agree to *join* in raising the fine, one of them may be willing to advance the whole amount *pro tempore* out of his own pocket, and then an apportionment on the principles adopted by the Court may be compelled between the tenant for life's estate and the remainderman at the tenant for life's decease, and either party advancing the fine will have a *lien* on the renewed lease for the amount expended beyond his proportional part. If the tenant for life and remainderman will neither jointly, nor will either of them singly advance the fine, then it is said the

(a) Lord Montfort v. Lord Cadogan, *ubi supra*; Townley v. Bond, 2 Conn. & Laws. 403, 406, per Sir E. Sugden; and see Wadley v. Wadley,

2 Coll. 11; [Brigstocke v. Brigstocke, 8 Ch. D. 357.]

(b) Milles v. Milles, 6 Ves. 761; and see Earl Cowley v. Wellesley, 1 L. R. Eq. 656; S. C. 35 Beav. 640.

trustees must raise the expenses out of the estate by way of mortgage (*c*); and at the tenant for life's decease the apportionment must be made in like manner.

Mortgage by trustees. — However, a mortgage, where neither the tenant for life nor remainderman will make the advance, is more easily to be suggested than to be carried into effect, for few persons would be disposed to lend their money on such a security, in the absence of any express power to mortgage. In such a case, therefore, it seems necessary to have recourse to the Court, except where the difficulty is met by the provisions of the Act before referred to (*d*).

* 2. **Old rule of contribution.** — The old rule of con- [*372] tribution was, that the tenant for life should advance one-third, and the remainderman two-thirds (*a*); but the question was put by Lord Thurlow, "Is a tenant for life at the age of ninety-nine, whose title accrued, in possession when he was ninety-eight, to pay one-third — a great deal more than any possible enjoyment? According to that rule, a man of the age of ninety-nine, who has the enjoyment only of ten days pays as much as a man of twenty-five" (*b*).

3. **Rule of keeping down the interest on the fine.** — Lord Alvanley adopted the rule (*c*), (and from the case of *Lawrence v. Maggs*, it would seem that Lord Northington had before acted upon the same principle (*d*),) that the tenant for life should merely *keep down the interest* of the fine. But Lord Eldon said, "he could not agree to that: in the case of tenant for life and remainderman in *tail* or in *fee*, the *inheritance* being charged with the mortgage, it was fair the tenant

(*c*) See *Buckeridge v. Ingram*, 2 Ves. jun. 666; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121; *Allan v. Backhouse*, 2 V. & B. 72.

(*d*) 23 & 24 Vict. c. 145, s. 9; *ante*, pp. 365, 366.

(*a*) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 118, *per* Sir J. Leach; *Lock v. Lock*, 2 Vern. 666, R. L. 1710, B. fol. 120; *Verney v. Verney*, 1 Ves. 428; *Limbros v.*

Francia, cited *Ib.*; *Graham v. Lord Londonderry*, cited *Stone v. Theed*, 2 B. C. C. 246; and see *Rowell v. Walley*, 1 Ch. Rep. 218; *Ballet v. Spranger*, Pr. Ch. 62; *Cornish v. Mew*, 1 Ch. Ca. 271.

(*b*) See *White v. White*, 9 Ves. 555.

(*c*) *Buckeridge v. Ingram*, 2 Ves. jun. 662, see 666; *White v. White*, 4 Ves. 24, see 33.

(*d*) 1 Eden, 453, see 455.

for life should only keep down the interest, for the natural division was, that he who had the *corpus* should take the burthen, and he who had only the fruit should pay to the extent of the fruit of the debt: but leases, whether for lives or years, were in their nature temporary, and therefore the position that the tenant for life was bound to pay the interest was to be understood with this qualification, that he was further bound to contribute a due proportion of the principal according to the benefit he derived from the renewed interest" (e).

4. **Court will not act on speculative calculations.** — It might be thought reasonable that the proportion of the expense to fall upon the tenant for life should be regulated by his actual age and *probable* duration of life; but it has been said that accident might render such a course unjust to the one party or the other, according as the tenant for life happened to live a longer or shorter period than was allowed by the calculation (f).

5. **Present rule of contribution.** — The rule now in operation was first clearly laid down by Lord Thurlow in *Nightingale v. Lawson* (g), a case, said Lord Eldon (who was one of the counsel in it) to which, from the intricacy of the subject, the reports have failed to do justice (h).

Nightingale v. Lawson. — The circumstances may be [*373] briefly stated as follows: — A widow, *tenant for life of a term which had twelve years to run, renewed for a further term of twenty-eight years, to commence from the expiration of the twelve years, and afterwards renewed for the additional term of fourteen years to commence from the expiration of the twenty-eight years. The widow lived through the original term of twelve years, and through nine of the renewed term of twenty-eight years. The question was raised after the death of the widow, in what proportions the tenant for life and the remainderman should contribute to the fines. The following points were resolved by Lord

(e) *White v. White*, 9 Ves. 560.

Sir J. Leach; and see *Bennett v. Colley*, 2 M. & K. 234.

(f) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 119, *per*

(g) 1 B. C. C. 440.

(h) *White v. White*, 9 Ves. 556.

Thurlow, after very anxious, frequent, and grave consideration of the subject (*a*), and have ever since been acquiesced in by the Courts.

(A) **Proportions to be paid by the tenant for life and remainderman.** — “That, as the widow had lived nine years after the expiration of the twelve, leaving nineteen years to run of the twenty-eight, the Master ought to take the sum paid by her for the renewal of the lease as the value of the term purchased, that is, of the term of twenty-eight years, to commence at the expiration of twelve years; he should then consider the value of the term of nine years after the existing term, and what the term of nineteen years after the existing term and the nine years was worth, and the latter was the proportion to be paid by the remainderman” (*b*). (Upon which resolution Lord Eldon thus comments: — “It was first considered,” he said, “what the interest of the tenant for life was in that term which had to run out at the time of the renewal, and then what benefit the tenant for life had received by the enjoyment of the renewed term from the period when the old term would have expired; and Lord Thurlow determined that the remainderman took that interest in the renewed term which was *ultra* so much of the renewed term as expired in the lifetime of the person who renewed, and the value of that interest he made the remainderman pay” (*c*).)

(B) **Kind of interest.** — “That as to the *kind of interest* to be allowed, *simple* interest would not be a satisfaction, as the widow had laid out her money totally, and the value of the lease was calculated upon the ground of compound interest: compound interest was therefore to be computed upon the proportional value of the nineteen years’ term to the whole expense of renewal” (*d*).

* (C) **Rate of interest.** — “That as to the *rate of* [*374] *interest*, in computing compound interest, you go upon the idea that the interest is paid upon the exact day

(a) See *White v. White*, 9 Ves. 580.

(b) See *Coppin v. Fernyhough*, 2 B. C. C. 291; *Barnard v. Heaton*, cited *White v. White*, 4 Ves. 29; *Playfers v. Abbott*, 2 M. & K. 108; *Earl of Shaftesbury v. Duke of Marl-*

borough, 2 M. & K. 118; *Lanauze v. Malone*, 3 Ir. Ch. Rep. 354.

(c) *White v. White*, 9 Ves. 558.

(d) See *White v. White*, 4 Ves. 35, 36; S. C. 9 Ves. 557, 558; *Bradford v. Brownjohn*, 3 L. R. Ch. App. 711.

and immediately laid out; but as this was impossible, it would be sufficient to compute interest at 4 per cent." (a).

(D) **Rate after the death of the tenant for life.** — "That such interest was only to be paid till the widow's death, for after that her executors had the demand upon the remainderman, and it became a common debt, and must carry simple interest only" (b).

(E) **Case of tenant for life having had no enjoyment.** — "With respect to the second renewal, as the widow had not lived to enjoy any part of that term, her executors were entitled to the whole of the expenses, with interest to be computed on the same principle as before" (c).

6. **Risk of losing the contribution.** — In this case, it will be observed, the *tenant for life* had disbursed the fine and, the payment being a charge upon the property, the widow was in no danger of eventually losing her demand. But where the tenant for life has not the means of renewing, but the remainderman comes forward with the money, if the contribution is to be suspended till the death of the tenant for life, it may happen, that, when the proportions can at last be ascertained, the estate of the tenant for life may be insolvent, and so the contribution be lost. "I admit," says Lord Eldon, "there is this difficulty in the case; but perhaps from the nature of the thing it cannot be helped: the utmost extent you can go to is to make the tenant for life give security for the sum which may eventually be due" (d).

7. **How the rule to be applied to leaseholds for lives.** — There occurs, also, this further difficulty, viz. how to apply the principle to the case of leaseholds for *lives*. The new *cestui que vie* may die in the lifetime of the original *cestui que vie*, and then no actual benefit accrues either to the tenant for life or to the remainderman. If the tenant for life paid the fine, is the remainderman to contribute nothing, because he took no benefit? If the remainderman paid the

(a) See *Giddings v. Giddings*, 3 Russ. 260.

(b) See *Giddings v. Giddings*, 3 Russ. 260; *Bradford v. Brownjohn*, 3 L. R. Ch. App. 711.

(c) *Coppin v. Fernyhough*, 2 B. C. C. 291.

(d) See *White v. White*, 9 Ves. 558, 559; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 122.

fine, is the tenant for life to contribute nothing, because he can excuse himself under the same plea?

8. From the nature of leaseholds for *lives* it seems difficult to discover any other principle of adjustment than one of the following:—

First, That the tenant for life and the remainderman should contribute according to their *chance of benefit at the time of the *renewal*, in which case the proportions [*375] would be settled thus:—The chance of benefit to the tenant for life is the value of the new life commencing from the death of the last surviving original *cestui que vie*, and determining on the death of the tenant for life. The chance of benefit to the remainderman is the value of the new life commencing on the death of the original *cestuis que vie* after the death of the tenant for life. In the proportion of these two values would be the respective contributions.

Secondly, That the *remainderman's* proportion should be regulated by the *actual benefit* derived. Thus, if the new *cestui que vie* die in the lifetime of any of the original *cestuis que vie*, or of the tenant for life, the remainderman takes no benefit and has nothing to pay. In this case the tenant for life is the *loser*. Should the new *cestui que vie* survive the original *cestuis que vie* and also the tenant for life, the value of the new life should be taken at the tenant for life's death, and that interest be paid for by the remainderman. It might happen that the original *cestuis que vie* and the tenant for life might die soon after the renewal, and then the estimated value of the new life would be greater than the whole fine; and in such a case the tenant for life would be a *gainer*. Thus the tenant for life might sometimes be a *gainer*, sometimes a *loser*: the remainderman would never either gain or lose, but would pay the exact value of the interest which he actually took (a).

Thirdly, That, *vice versâ*, the *tenant for life's* proportion should be regulated by the actual benefit derived, and that the contingent loss or gain, as the case might be, should fall

(a) See Lord Eldon's remarks in *White v. White*, 9 Ves. 559, which, however, are very obscurely worded.

upon the *corpus* of the property, that is, upon the remainderman.

9. *Reeves v. Creswick*. — In *Reeves v. Creswick* (b), where leaseholds for *lives* were devised to trustees upon trust for A. for life, with remainder to her children, and a bill was filed by the trustees for the purpose of having the expenses of renewal raised, the following scheme, which had been approved by the Master, was directed to be carried into effect. The period of enjoyment of the property by the tenant for life under each of the old leases being the joint duration of her own life and that of the then surviving *cestuis que vie* named in such lease, and the period of her enjoyment of the property under each corresponding renewed lease being in like manner the joint duration of her life, and those of the new *cestuis que vie*, or the longest liver of them; the

difference between the values of the estates for
[*376] *these two periods gave the benefit derived by the

tenant for life from the renewals in question; and the residue of the increased value of the property expressed the benefit derived from the renewals by the remainderman. Calculations were accordingly made by the actuary of an insurance office, upon the above principles, of the benefit derived by the respective parties from the renewal of each lease, and the fines and expenses of renewal being divided in the proportions so ascertained, the total amount, which thereupon appeared to fall to the share of the tenant for life, was directed to be insured upon her own life for the purpose of providing, upon her decease, for the payment of a corresponding part of the principal of the mortgage debt to be raised upon the property. The policy of insurance was ordered to be assigned to the mortgagee, and directions were given for paying the premiums on the policy, and for keeping down the interest on the entire mortgage-debt out of the annual rents and profits of the estates. The only observation that occurs upon the propriety of this arrangement is, whether the tenant for life ought to have been directed to keep down the interest of the *entire* mortgage-debt out of the annual rents as between him and the remainderman,

(b) 3 Y. & C. 715. See as to this case, note (a), 369, *supra*.

or only of that part of the principal which fell to the share of the tenant for life. It will be seen also from this statement, that the Court made an apportionment according to the *speculative* benefit, a course which the Court has in other cases disclaimed, except for the purpose of raising the fine *in præsentia* without prejudice to the ultimate apportionment on the death of the tenant for life, when the relative benefits derived can be ascertained. It was perhaps understood, though it does not so appear from the report, that the decree was to be without prejudice to an ultimate adjustment.

Jones v. Jones. — In *Jones v. Jones* (a), before Vice-Chancellor Wigram, involving leaseholds for *lives* as well as leaseholds for *years*, and where the fines were to be raised out of the rents or by mortgage, or by such other means as should be advisable, the mode of raising and ultimately apportioning the fines was fully considered, and the importance of the subject may justify a somewhat lengthened extract from the judgment. "The rule," said the Vice-Chancellor, "is, that the parties are to pay in proportion to their enjoyment, by which I understand their *actual* enjoyment to be meant, and not an extent of enjoyment to be determined by mere *speculation*, or by a calculation of *probabilities*, and the question is, how that apportionment is to be effected. If the *tenant for life* is willing to *take upon himself to [*377] renew, he will enjoy the estate during his own life, and when the actual period of his enjoyment is ascertained, his estate will have a lien upon the residue of the term for any overpayment which may have been made. The case is one of much greater difficulty where the renewal is made by the *remainderman*, or (which as to this difficulty is the same thing), where the trustee is to raise the money and charge it on the *corpus*. In that case, unless some course be taken to protect the interest of the remainderman, the tenant for life may enjoy the estate during his whole life without bearing any greater charge than the interest on the debt created by the renewal, and he may leave no assets to pay his proportion of the principal money. That inconvenience may perhaps be avoided by requiring the tenant for life to give

(a) 5 Hare, 440.

security, but there is a practical difficulty in determining for what sum the tenant for life is to give security. If he gives security for the whole amount of the fine, because by possibility he may enjoy the whole benefit resulting from the renewal, the difficulty is got over; but the tenant for life may not be able to give security for the whole although he might for a part, and how is the Court in such a case to deal with the interests of the parties? I do not, however, think that the difficulty to which I have adverted is insuperable. The tenant for life may in the *first instance* be required to give security for an amount calculated upon the assumption that his life will last during a portion of the renewed lease. If he should die within the time during which it was assumed that his life would last, the security would of course be more than sufficient to satisfy his proportion of the fine, and it would be void for the excess. If he outlived that time he might, if necessary, be called upon to give a further security to cover the additional proportion then to be attributed to him. It appears to me proper to declare that *each party* is to bear the burthen of the renewal in the proportion of *his actual enjoyment* of the estate. There will be a direction for the tenant for life to keep down the interest, and a reference to ascertain what proportion of the fine was properly payable by him. This inquiry is necessarily by anticipation. There will then be a reference to approve of a security, and these directions must be followed by a declaration that the reference and security are to be without prejudice to the question whether the tenant for life may or may not be liable to pay less or more than the sum for which the security is given." The doctrines enunciated in this case have been since approved as sound, and the tenant for life, where the fine has been paid out of the trust fund, has been ordered to [*378] give security * for his contribution to the fine in proportion to the benefit which he should ultimately derive from the new life (a).

It must be observed, however, that *Jones v. Jones* leaves untouched the case which creates the greatest difficulty, viz.,

(a) *Hudleston v. Whelpdale*, 9 Hare, 775.

where by the death of the new *cestui que vie* in the lifetime of the tenant for life no benefit from the renewal accrues either to the tenant for life or to the remainderman. Nor does it appear to have been distinctly perceived by the Court that the renewal of leaseholds for lives being essentially matter of *speculation*, it is impossible to regulate the contribution of either tenant for life or remainderman according to the *value* of his actual enjoyment, without *e converso* making the remainderman or the tenant for life take upon himself the risk of the renewal proving profitable or unprofitable in its ultimate results; and further, that in order to make each party bear the burthen of the renewal in the *proportion* of his actual enjoyment, it would be necessary to await the death not merely of the tenant for life but also of the *cestuis que vie*, a course which would be extremely inconvenient, and, it is conceived, contrary to the general practice of the Court.

In *Harris v. Harris* (*b*), copyholds held for three *lives*, were settled on A. for life with remainders over, and two of the *cestuis que vie* having died, A. put in two new lives at his own expense. A. died in the lifetime of the original *cestuis que vie*, so that A. in event had no benefit from the renewal, and the whole fine was ordered to be repaid to A.'s personal representative. But it might happen that the two new lives would also die in the lifetime of the original *cestuis que vie*, and then the remaindermen also would have no benefit from the renewal. The Court, therefore, must have assumed that the speculative gain or loss was to fall on the remaindermen.

10. **Tenant for life regarded as a trustee.** — Where the legal estate of renewable leaseholds is devised without the interposition of a trustee, but the testator at the same time directs, either expressly or by implication, that the leases shall be renewed, the tenant for life is then himself a trustee (*c*), and as such is compellable to apply for renewals (*d*), but ought before applying for a renewal to consult the remainderman (*e*).

(*b*) *Harris v. Harris* (No. 3), 32 Beav. 833.

(*c*) *White v. White*, 5 Ves. 555.

(*d*) *Lock v. Lock*, 2 Vern. 666; and see *White v. White*, 4 Ves. 24.

(*e*) *White v. White*, 5 Ves. 555.

11. **Tenant for life refusing to renew.**—It has been said, that if from the threats or acts of the tenant for life [*379] there appears the intention of suffering the lease * to expire, the Court would appoint a receiver of the estate to provide a fund for the renewal (*a*); and that if the tenant for life has already allowed the period for renewal to pass, the rents and profits may be impounded for either procuring a renewal (*b*), or finding the remainderman a compensation (*c*). But no suit *for damages* can be effectually prosecuted before the tenant for life's decease; for so long as it remains uncertain how much of the renewed term will survive to the remainderman, the amount of the injury done to him cannot be ascertained (*d*). It follows that the mere forbearance of the remainderman to bring a suit during the continuance of the life estate cannot be construed into *laches* or acquiescence (*e*).

12. **Admission fines in copyholds.**—The fines, fees and expenses of the *admission* of new trustees to *copyholds* must be borne by the tenant for life and remaindermen in proportion to their respective interests, according to the principles which regulate the renewal of leaseholds. Thus a testator devises copyholds to A. and his heirs upon trust for B. for life, with remainder to C. in fee. A. pays a fine on his admission and dies. His heir is admitted and pays a fine and dies, and his heir again is admitted and pays a fine. Thus the fine for the admission of the trustee is a kind of purchase-money for an estate for life of that trustee. The burthen must be borne by the *cestuis que trust* of the estate, and they contribute to the fines in proportion to their actual enjoyment, as in the case of leaseholds (*f*). These observations are on the assumption that the will or settlement contains no express directions how the fines are to be raised.

(*a*) See *Bennett v. Colley*, 2 M. & K. 233.

(*b*) See S. C. 5 Sim. 192.

(*c*) S. C. 5 Sim. 181; 2 M. & K. 225; and see *Lord Montfort v. Lord Cadogan*, 17 Ves. 490.

(*d*) *Bennett v. Colley*, 5 Sim. 181;

S. C. 2 M. & K. 225; *Harris v. Harris* (No. 3), 32 Beav. 333.

(*e*) *Bennett v. Colley*, 5 Sim. 181; 2 M. & K. 225.

(*f*) *Carter v. Sebright*, 26 Beav. 374; and see *Playters v. Abbott*, 2 M. & K. 108; *Bull v. Birbeck*, 2 Y. & C. C. 447; *Jones v. Jones*, 5 Hare, 461.

DUTIES OF TRUSTEES TO PRESERVE CONTINGENT
REMAINDERS.

1. TRUSTS of this description are at present of much less frequent occurrence than they were formerly, and the reason is easily explained.¹

2. **Object of the settlement under the old law.** — As the law stood before the recent Acts, which will be noticed presently, the objects of a strict settlement (where there was no limitation to trustees to preserve contingent remainders), were liable to be defeated in the two following ways:

In the first place, as formerly a contingent remainder was extinguishable by the *surrender* or *merger* of the particular estate in the inheritance (*a*), if lands were limited to A. for life with remainder to his unborn children, with remainder to B.; A. might surrender his life estate to B., or B. might release to A., or A. and B. might join in a conveyance of the fee simple to C., and in each case the contingent remainder was squeezed out, and if issue were afterwards born, they had no remedy at law or in equity.

Again, the intention of the settlor was that the estate should remain in the family as long as the law permitted, and that on the death of the tenant for life it should devolve on the person who happened at the time to stand next in the series of limitations, but in fact when the eldest son attained twenty-one he was enabled, with the concurrence of his father in making a tenant to the *præcipe*, to bar all the subsequent remainders; and thus, on the majority of the eldest son, the estate became the absolute property of the father and son, and the interests of those in remainder were

(*a*) Also by forfeiture of the particular estate. But see now 8 & 9 Vict. c. 106, s. 8.

¹ Trustees to preserve contingent remainders are rendered unnecessary in the United States by local statutes, excepting perhaps Pennsylvania.

sacrificed, except so far as the father and son might choose to give them effect.

3. To obviate these results settlements were usually penned in one of the two following modes: either, [*381] *First*, The legal estate was *limited to the use of the parent for 99 years if he should so long live, with remainder to the use of trustees and their heirs during the life of the parent upon trust to preserve the contingent limitations, and on his death to other uses in remainder; or to the use of trustees and their heirs during the life of the parent in trust for him, and on his death to other uses in remainder; or, *Secondly*, The settlement was to the use of the parent for life with remainder to trustees and their heirs during the life of the parent upon trust to preserve the contingent remainders, and on his death to other uses in remainder.

4. *Case of the legal estate for life in the trustee.*—In the *first* form of settlement the object in view, by vesting the freehold in the trustees, was to preserve the contingent limitations from being destroyed by the surrender or merger of the particular estate, which would have been practicable had the freehold been limited to the parent himself, and also to prevent the barring of the entail and the alienation of the estate for purposes not authorised by the spirit of settlement.

5. *Case of the legal estate in the tenant for life.*—In the *second* form it was the duty of the trustees as before to preserve the contingent limitations, but as the freehold in possession was vested in the parent the trustees had no power to prevent a recovery by the father and son as soon as the latter came of age, but if the tenant for life committed a forfeiture (as by feoffment in fee in order to defeat the contingent remainders), it was then the duty of the trustees to enter and so vest the freehold in possession in themselves, and it was then their further duty, as in the first form, though the settlor himself might not have contemplated such a purpose, not to concur in putting an end to the settlement, except where such interference was prudent and proper (*a*).

(*a*) The duties of trustees to preserve contingent remainders with reference to the old law have been omitted in this edition, but will be found in the early editions.

6. **Effect of the Fines and Recoveries Act upon trusts to preserve contingent remainders.**—The law upon the duties of trustees to preserve contingent remainders has recently undergone great alteration.

By the 15th section of the Fines and Recoveries Act (*b*) it is declared, that every tenant in tail, whether *in possession, remainder, contingency, or otherwise*, shall have power to dispose of the lands entailed for an estate in fee simple absolute; but by the 40th and two following sections, the disposition must be by *deed inrolled*, and must be made with the *consent of the protector of the settlement*.

7. **Operation of the old law.**—Under the old law the key of the settlement was in the hands * of the [*382] person who was the owner of the freehold in possession; but now, by the 32d section of the Act, any settlor entailing lands may *appoint* one or more persons *in esse*, not exceeding three and not being *aliens*, to be protector or protectors of the settlement during the period therein specified, and may perpetuate the protectorship by means of a power of appointment of new protectors (*a*). If the settlor has not taken advantage of this permission, then, by the 22d section, if there be subsisting under the settlement any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail, the owner of such prior estate, or of the first of such prior estates if more than one, or *the person who would have been owner had he not disposed of his interest*, is constituted the protector of the settlement. But, by the 27th section, no dowress, *bare trustee*, heir, executor, or administrator shall be protector. However, by the 31st section, it is enacted, that, “where, *under a settlement made before the passing of the Act*, the person who under the old law should have made the tenant to the *præcipe*, shall be a *bare trustee*, such trustee during the continuance of the estate

(*b*) 3 & 4 Will. 4, c. 74.

[(*a*) Where a testatrix appointed three persons protectors, and made provisions for the appointment of other persons to be protectors in case they should die, and the protectors

all died but no new protectors were appointed in their place, it was held by V. C. Malins that the tenant for life was the protector. *Clarke v. Chamberlin*, 16 Ch. D. 176.]

conferring the right to make the tenant to the *præcipe* shall be the protector;" but, by the 36th section, the protector of a settlement shall not be deemed to be a *trustee* in respect of his power of consent, and a Court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving his consent as a breach of trust.

8. **Operation of the new law.** — Under the provisions, therefore, of this Act, as regards settlements made *since* the passing of the Act, a *bare trustee* cannot be protector in any case (*b*). As regards settlements made *before* the passing of the Act, though the trustee may become protector by the operation of the 31st section, he is not accountable in a Court of equity for the exercise of his discretion. But a bare trustee who is protector under that section can insist on retaining the legal estate only so long as the purposes of the trusts exist, that is, so long as according to the rules of a Court of equity he is required to be a trustee. Therefore, where there was a devise of lands to trustees upon trust for testator's daughter during her life, for her separate use, without power of anticipation, with remainder to the use of her children as tenants in common in tail with [*383] remainders *over, it was held that the testator's daughter, having become *discoverte* and being *sui juris*, could compel a conveyance by the trustees of their legal estate (*a*).

9. **7 & 8 Vict. c. 76.** — By 7 & 8 Vict. c. 76, s. 8, it was declared that no estate should be created by way of *contingent remainder*; but that every estate which before that time would have taken effect as a contingent remainder, should take effect as an executory devise, or if in a deed, as an estate having the same properties as an executory devise, and that *contingent remainders* already created should not be defeated by the destruction or merger of the preceding estate.

10. **8 & 9 Vict. c. 106.** — But this sweeping provision was repealed by 8 & 9 Vict. c. 106, s. 1; and in lieu thereof it

[*(b)* See *Re Dudson's Contract*, 8 Ch. D. 628; *Re Ainslie*, 51 L. T. N. 89. S. 780.] [*(a)* *Buttanshaw v. Martin, Johns*.

was enacted (by s. 8), that a *contingent remainder* should be deemed capable of taking effect, notwithstanding the determination by *forfeiture, surrender, or merger* of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

11. **Remarks upon the limitation to preserve contingent remainders.**—In consequence of this enactment it is now unnecessary to make use of any machinery for preserving contingent remainders from destruction by the *forfeiture, surrender, or merger* of the preceding estate; and therefore, if an estate be limited to the use of A. for life, with remainder to his unborn children, the contingent limitations cannot be defeated. But limitations to trustees, during the lives of the tenants for life, are still frequently introduced in settlements for the purpose of creating a check upon the tenants for life, as, in cases of waste by the tenants for life, it would be the duty of the trustees to interfere as protectors of the remaindermen's interest (b).

12. **Contingent remainders may still be defeated by determination of life estate in due course.**—Contingent remainders however created before the recent Act (c) still remain liable to be defeated, should the preceding life estate determine, *in due course*, before they become vested, and the limitation of an estate *pur autre vie* adequate to support the contingent remainders is accordingly in many cases a matter of considerable importance. Thus if an estate be limited to A. for life, with remainder to the unborn children of B., or to the children of B. who should attain 21, here the contingent remainders, if B. survives A., would require support by a limitation of the estate to trustees after the death of A. until the children of B. should come into existence, in the one case, or until a child should attain 21 in the other.

* 40 & 41 Vict. c. 33. — [But now by the recent [*384] Act (a) every contingent remainder created by any instrument executed after the passing of the Act (2 August, 1877), or by any will or codicil revived or republished by any

(b) *Perrot v. Perrot*, 8 Atk. 94, per Lord Hardwicke; *Garth v. Cotton*, 1 Ves. sen. 555, *per eundem*.

[(c) 40 & 41 Vict. c. 33.]

[(a) 40 & 41 Vict. c. 33.]

will or codicil executed after that date which would have been valid as a springing or shifting use or executory devise, or other limitation, had it not had a sufficient estate to support it as a contingent remainder, is in the event of the particular estate determining before the contingent remainder vests, to take effect as if it were a springing or shifting use, or executory devise or other executory limitation.

The effect of this enactment is to render contingent remainders independent of the determination of the particular estate in all cases in which the limitation would have been valid had it been a springing or shifting use, or an executory devise or other limitation; but where the limitation would have been void, as for instance for remoteness, had it been a springing or shifting use or an executory devise or other limitation, the remainder will still be liable to be defeated by the determination of the particular estate before it has become vested.

13. **Legal limitations not construed as equitable in order to protect contingent remainders.**—If an estate be devised to trustees and their heirs to certain uses, showing a clear intention on the part of the testator to create a succession of *legal* limitations, the Court will not hold the legal estate to be in the trustees merely because a different construction would leave the contingent remainders created by the devise unprotected by any particular estate (*b*).]

(*b*) *Cunliffe v. Brancker*, 3 Ch. D. 279; 5 *Hare*, 573; see *Marshall v. Gingell*, 21 Ch. D. 790.

DUTIES OF TRUSTEES FOR RAISING PORTIONS.

THE subject of portions is of so extensive a character, that to exhaust it would require a treatise by itself. All that can be attempted in a single chapter is a brief summary of the law upon the points of most usual occurrence in practice.¹

Who are portionists. — We propose in the *first* section to inform trustees *who* are their *cestuis que trust*, or in other words who are to be regarded as portionists — a question that appears simple enough in itself, and yet involves a multitude of cases which can only be reconciled by the most refined distinctions. The principal struggle has been where and under what circumstances an *eldest* son is to be included amongst or excluded from the designated class. But further,

¹ *Raising portions.* — In the United States, portions are generally raised out of rents and profits, or by mortgaging the estate. If the portion is to be raised in accordance with the provisions of a will, the directions must be strictly followed; 1 Story Eq. Jur. § 575. It is important to determine whether a portion is to be raised at once upon the happening of a certain event, or is to await the termination of a life estate in the parents; 2 Story Eq. Jur. § 1003. Some cases have been decided one way and some the other, but perhaps the majority favor the immediate vesting of the interest, and the postponement of payment during the life of the parents; *Everett v. Mount*, 22 Ga. 323; *Letchworth's App.* 30 Pa. St. 175; *Thrasher v. Ingram*, 32 Ala. 645; *Bowman v. Long*, 23 Ga. 242; *Petty v. Moore*, 5 Sneed, 126. The intention should be clearly shown, and generally the portion will vest on the coming of age of the party receiving it; *Cox v. McKinney*, 32 Ala. 461; *High v. Worley*, 32 Ala. 709; *Devane v. Larkins*, 3 Jones Eq. 377. If the trustees are to raise the portions "as soon as conveniently may be," or "as soon as possible," they will do it by mortgage, rather than from the rents and profits; *Bloomer v. Waldron*, 3 Hill, 367. And this may be done when the trustees are directed to raise it from rents and profits, if they are not expressly limited to annual profits; *Schermerhorne v. Schermerhorne*, 6 Johns. Ch. 70; 2 Story Eq. Jur. § 1063. Where the rents and profits are to be applied to the education and maintenance of children there is a charge on the estate; *Fox v. Phelps*, 20 Wend. 437; if the portion is not raised from the rents and profits, the distributees of them may be required to refund; *Hawley v. James*, 5 Paige, 318.

the question *who* are portionists, involves the inquiry when or at what time portions, which are regulated by peculiar principles, are vested; and again, even if portions may have become vested, it remains to be asked whether they may not have become divested on the doctrines of ademption and satisfaction—doctrines which open a wide field of controversy, and are to some extent left still in an unsatisfactory state.

Amount to be raised.—In the *second* section we shall explain (and this may be compressed within much narrower bounds) what is the *amount* to be raised, both as regards the principal sum and interest, and also as to costs; [and also in what cases maintenance will be allowed, even though the corpus be not vested.]

When to be raised.—In the *third* section we shall have to consider at *what time* the portions ought to be raised, and more particularly when portions are charged on *reversionary* interests, for then either the estate must suffer by raising the portions at a sacrifice in *præsenti* out of an interest to take effect in future, or else the portionists must be left destitute until the reversion falls into possession.

[*386] *** Mode of raising.**—Lastly, in the *fourth* section we shall offer some practical remarks as to the best *mode* of raising the portions, as whether by sale or mortgage, or a fall of timber, or out of mines, or in what other manner.

SECTION I.

WHO ARE TO BE REGARDED AS PORTIONISTS.

Under this head we shall inquire: *First. Who* are meant by younger children where the estate charged is settled on an “*eldest*” child. *Secondly. Who* are meant by younger children where the estate charged is *not* settled on an “*eldest*” child. *Thirdly. At what time* the portions vest. *Fourthly. Of ademption and satisfaction.*

Settlement on eldest son.—*First. Who* are meant by younger children where the estate charged is settled on an “*eldest*” child.

1. "The Court in the case of portions," observed Sir G. Turner, "seems to have regarded rather the *purpose* than the *words* of the instrument. In some of the cases, indeed, the Court seems almost to have carried into effect the purpose of the instrument in opposition to the words, and although in the late cases more weight has been given to the terms of the instrument, there can be no doubt that in cases of this nature, very great attention must be given to the purpose of the instrument" (a).

2. **General rule.**—In the first place, then, let us see in what cases an eldest child actually will be regarded as a younger child constructively, or, (which is the same thing), in what cases a younger child will be deemed the eldest child.

"Every child," said Lord Hardwicke, "except the *heir*," (*i.e.* except the one who takes the estate) "is considered in equity as a younger, and eldership, not carrying the estate along with it, is considered not such an eldership as shall exclude," viz. from sharing in the portions provided for younger children. "It would be hard, that the right of eldership should be taken away, and yet not have the benefit of a younger child" (b).

3. **Time of distribution.**—If, therefore, before the period fixed for *distribution of the portions*, the estate shifts either by the original limitations or by *appointment [*387] under a power contained in the settlement from the eldest child to a younger child, the younger child so taking the estate is treated as the eldest (a), and the eldest child losing the estate is deemed a younger child (b).

(a) *Remnant v. Hood*, 2 De G. F. & J. 413; approved by V. C. Wood, *Davies v. Huguenin*, 1 H. & M. 743.

(b) *Duke v. Doidge*, 2 Ves. sen. 203, note.

(a) *Davies v. Huguenin*, 1 H. & M. 730; *Re Bayley's Settlement*, 9 L. R. Eq. 491; *Teynham v. Webb*, 2 Ves. sen. 198; *Stanhope v. Collingwood*, 4 L. R. Eq. 286; S. C. nom. *Collingwood v. Stanhope*, 4 L. R. H. L. 43; *Broadmead v. Wood*, 1 B. C.

C. 77; *Savage v. Carroll*, 1 B. & B. 265; *Simpson v. Frew*, 5 Ir. Ch. Rep. 517; [*Reid v. Hoare*, 26 Ch. D. 363;] *Jermyn v. Fellows*, For. 93, was a case of special circumstances. In *Leake v. Leake*, 10 Ves. 477, the doctrine of *Chadwick v. Doleman*, 2 Vern. 528, would seem to have been applicable, though it was not applied. The question was not discussed.

(b) *Duke v. Doidge*, 2 Ves. sen. 203, note.

Chadwick v. Doleman. — Thus, in the leading case of *Chadwick v. Doleman* (c), a father on his marriage settled an estate to the use of himself for life with remainder (subject to a jointure) to the use of trustees (upon trust within six months after his decease to raise 4,000*l.* for younger children's portions as the father should appoint, or in default of appointment to be divided amongst the younger children), with remainder to the use of the first and other sons in tail. There were several children of the marriage, viz. *Humphrey* the eldest, and *Thomas, John, Lewis, Ann, and Dorothy*. By a deed, dated in 1686, the father appointed the 4,000*l.*, giving 2,600*l.* part thereof to Thomas the *second* son on the occasion of his marriage, and after this *Humphrey* the eldest son died in his father's lifetime without issue, and thereupon the father appointed the 2,600*l.* amongst his younger children other than Thomas. On the death of the father the estate devolved on the second son Thomas, and then the question arose whether the first or the second appointment was good, or in other words whether Thomas was entitled to the 2,600*l.* as well as the estate. The Lord Keeper said he admitted that Thomas at the time of the appointment was a person capable of taking, and was a younger child within the power, but that this was a defeasible appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was capable of taking at the time of the appointment made, but that was *sub modo* and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir, so that he had as it were only a defeasible capacity. And it was, therefore, adjudged that Thomas, who took the estate, was not also entitled to the 2,600*l.*

4. **Eldest son taking place of younger son.** — In this case the second son by succeeding to the estate and so becoming the eldest was deprived of any share in the portions for [*388] *younger children, and no claim appears to have been put forward on behalf of *Humphrey* the eldest son to stand in the place of a younger son. But it has since

been settled that under such circumstances the eldest son, even though he died in his father's lifetime, and sustained up to his own decease the character of eldest son, but never eventually came into possession of the estate, is entitled to be treated as a younger son, and to share with the other portionists. Thus in *Davies v. Huguenin* (a), the estate was settled on J. Davies and his wife successively for life, remainder to the children as he should appoint, and subject as aforesaid to the use of a trustee for 500 years for raising portions for younger children; remainder to the first and other sons in tail. J. Davies had two sons, William the elder, and John Stanley the younger. William attained twenty-one and died in his father's lifetime, [and it was held that his personal representative thereupon became entitled to a portion, but subject to the exercise of the power of appointment.] Again, in *Ellison v. Thomas* (b), the eldest son of R. E. C. was not tenant in tail but tenant for life only, with remainder to his first and other sons in tail; and yet it was held that the personal representative of this eldest son who died without issue male before coming into possession of the estate, was entitled to share in the portions provided for the younger children of R. E. C.

[If the estate is sold for payment of charges, and it is insufficient for payment of all the charges, so that the eldest son gets nothing under the limitation to him, he must still be treated as an eldest child taking the estate subject to the charges, and is not entitled to share in the portions provided for the younger children (c).]

5. **Eldest daughter a younger child.**—If an estate be settled on the first and other sons with a provision for younger children, an *eldest daughter* though the firstborn, is regarded as a *younger child* (d). So, if an estate be settled on the first and other *sons* of A. with remainder to B., and there is a trust for raising portions for A.'s younger children, and A.

(a) 1 H. & M. 730. See *Broadmead v. Wood*, 1 B. C. C. 77; but see *Gray v. Earl of Limerick*, 2 De G. & Sm. 371.
 491. [(c) *Reid v. Hoare*, 26 Ch. D. 363.]

(b) 1 De G. J. & S. 18; 2 Dr. & Sm. 111; and see *Collingwood v. Beale*, 1 P. W. 245, *per Cur.*
 (d)

has two *daughters* only, so that the estate shifts over to B., both the daughters of A. are younger children, and entitled to share the portions between them (*e*).

[*389] *6. **Eldes son may be a younger son.** — The rule that a younger son who at the time of distribution takes the estate and so becomes the eldest son, is excluded from sharing in the portions, must be qualified by the condition that he takes the estate under the same settlement, or under some settlement incorporated into the portions' settlement, for otherwise he retains his rights as a younger son. Thus an estate was settled to the use of A. for life, with remainder (subject to A.'s wife's annuity) to the use of his first and other sons in tail, with a trust for raising portions on the death of the wife for younger children, to be vested at twenty-one or marriage. A. had two sons, Henry the eldest, and George, and after the death of A. in 1842, but during the lifetime of A.'s widow, and therefore before the portions were raisable, Henry barred the entail and devised the estate to his brother George; and it was held that on the death of A.'s widow in 1857, when the portions became raisable, George was entitled to share in the portions, though he was then the eldest son and was the owner of the estate, because he derived his title to it, not as eldest son under the settlement, but as devisee of his brother (*a*).

7. **Eldes son parting with the estate.** — But if at the time of distribution the eldest son *has not* the estate, but except for his own act (as in joining with his father in defeating the entail and resettling the property) he *would have had* the estate, he is not allowed to plead the want of the estate and to claim as a portionist (*b*).

8. **Whether the rule applies only to parents or persons loco parentis.** — The doctrine of portions as laid down in Chad-

(*e*) Beale v. Beale, 1 P. W. 244; 685; Spencer v. Spencer, 8 Sim. 87; and see Butler v. Duncomb, 1 P. W. 448; Hall v. Luckup, 4 Sim. 5; 486; [Domville v. Winnington, 26 Ch. D. 382;] Peacocke v. Pares, 2 Keen. Emery v. England, 3 Ves. 232.

(*a*) Adams v. Beck, 25 Beav. 648; 680, must be considered as overruled. Sandeman v. Mackenzie, 1 J. & H. 613; Sing v. Leslie, 10 Jur. N. S. 794; Macoubrey v. Jones, 2 K. & J. 483; (b) Stanhope v. Collingwood, 4 L. R. Eq. 286; Collingwood v. Stanhope, 4 L. R. H. L. 43.

wick *v.* Doleman has been said to apply only where the settlor is the parent or stands *loco parentis*; but if this proposition were accepted literally, then if a testator devised an estate to A. a perfect stranger for life, with remainder to his first and other sons in tail, and created a term in the same estate for raising portions for the younger children of A., the second son of A., though, by the death of his elder brother without issue in A.'s lifetime, he succeeded to the estate, would also be entitled to share in the portions. Upon examination of the several authorities it will be found that at the most there are only a few dicta in support of the proposition suggested (c). Lord Hardwicke on * the [*390] other hand not only applied the doctrine of Chad-

(c) Thus, in *Hall v. Hewer*, Amb. 203, a testator devised his real estate to John Hewer for life, remainder to John's first and other sons in tail, remainder to his daughters in tail, remainder to Humphrey, second son of T. Hall, in fee. And the testator charged his estate with 6000*l.* in trust for the younger children of T. Hall, in case J. Hewer died without leaving issue. James the eldest son of T. Hall, died in the lifetime of J. Hewer, so that on the death of the latter, Humphrey was the eldest son of T. Hall. It was held upon the construction of the will, that the 6000*l.* was contingent until the death of J. Hewer, and then vested in such persons as were then the younger children of T. Hall, and as Humphrey was *then* the eldest he took nothing. This was the ground of the decision, and therefore the question did not arise whether if Humphrey had previously acquired a vested interest, he could have lost it by becoming the eldest son. Under no circumstances, however, could he have become disentitled, for there was no shifting of the estate, which had never been given to James the eldest son, but to Humphrey himself. The testator meant the estate and the portion to go together. The Court observed "There

was no case where the Court had considered a younger child as an eldest, but between parent and children, or those who stood in *loco parentis*." But this was merely a dictum.

In *Matthews v. Paul*, 3 Sw. 328 (and see *Adams v. Adams*, 25 Beav. 652; *Adams v. Robarts*, Ib. 658), a testatrix bequeathed her Imperial annuities and five per cent. stock in trust, upon the termination of the Imperial annuities (which event occurred in May, 1819) for the children of her daughter Mary Paul, except an eldest son. Mary Paul had at the testatrix's death five children, viz. two sons, John and Walter, and three daughters. John died before the termination of the annuities, so that on the occurrence of the latter event Walter was the eldest son, and the question was, whether he was to share in the portions and it was ruled that he was not, for that as the time of distribution was the period for ascertaining who were to be *included* in the class, it must equally be the period for ascertaining who were to be *excluded*. Here there was no real estate in settlement at all, and therefore the principle of *Chadwick v. Doleman* did not come into question. The Court, however, during the argument, observed, "The cases where this rule

wick v. Doleman to the case, where a *grandmother* [*391] having a power over the settled * estate, appointed

has been adopted have arisen on gifts by *parents* or persons in *loco parentis*. In general the estate passing to the eldest son has been in the power of the persons making the provision for the younger children, and the same instrument has comprised the estate and the provision. Has the rule ever been applied to portions given by a stranger, who merely contemplated the chance of property descending to the eldest son, as representative of the family ? "

In *Lincoln v. Pelham*, 10 Ves. 166, (and see *Bowles v. Bowles*, *ib.* 177) the circumstances were somewhat similar. Lady Pelham gave a residuary fund in trust for Frances Pelham for life, and after her death for the younger children of the testatrix's late daughter, Catherine, Duchess of Newcastle. At the date of the will there were three children living of Catherine, viz. Lord Lincoln, Thomas, and John. Lord Lincoln died in the testatrix's lifetime, and Thomas contended that as he was a younger child at the date of the will, though not at the death of the testatrix, he was entitled to a share. Lord Eldon disallowed the claim, and considered that the general description of younger children was not equivalent to naming the younger children living at the date of the will, but meant younger children for the time being, and added, that "whatever was the principle as to *parents* or persons in *loco parentis*, it had no application here, for though the grandmother was executing a purpose, which as to this kind of doctrine might be considered *parental*, (the purpose of providing for the younger branches, of other persons certainly, but in a sense her family,) yet she thought that her daughters were sufficiently provided for, so as to make it unnecessary to consider them objects of her care," 10 Ves. 174. Here,

again, there was no dispute as to the effect of the shifting of any estate, but it was simply a question of construction, who were the persons meant by the description of younger children.

In *Scarisbrick v. Lord Skelmersdale*, 4 Y. & C. 116, Justice Maule said, "It is to be observed that it is only in cases of provision made by parents or persons standing *loco parentis*, that courts of equity give this forced construction to the word 'younger.' In cases of gifts by strangers courts of equity, as well as courts of law, construe the word according to its literal import, as laid down by Lord Hardwicke in *Hall v. Hewer*. The distinction is founded on the consideration, that in the one case the party giving or settling is regarded as doing an act which he was under a moral, though not a legal obligation to perform, whereas in the case of a gift by a mere stranger, no such obligation exists," &c.

In *Sandeman v. Mackenzie*, 1 J. & H. 613, Mrs. Chisholm, a widow with three children (Alexander, the eldest — who was in possession of the Chisholm estates, subject to his mother's jointure — Duncan, and Jemima), married Sir Thomas Ramsay, and by the settlement made on the marriage, Sir T. Ramsay settled 10,000*l.* upon himself and wife successively for life, with remainder to the then present children of Mrs. Chisholm (except Alexander) equally at twenty-one; and if none of such younger children of Mrs. Chisholm should attain twenty-one, then in trust for Alexander. Sir T. Ramsay died in 1830, and Lady Ramsay in 1859; Alexander died in his mother's lifetime in 1838, and therefore Duncan came into possession of the Chisholm estates. All the three children attained twenty-one. The question was whether Dun-

portions to her younger grandchildren (*a*); but he also applied it where the settlor was an *uncle*, and this not because he considered the uncle as standing *loco parentis*, but on general * principles (*a*). "Where," [*392] he said, "a provision is made by a *father* either by will or settlement for younger children, an elder unprovided for shall be deemed a younger, and the ground is that every branch of the family should be provided for, the Court not considering the words elder or younger. The question then is, whether there exists any difference where the settlement is made by a father's brother to a *collateral* relation, a

can, though he had succeeded to the Chisholm estates, was entitled to share in the 10,000*l.* portions, and it was held that he was entitled, and Sir W. P. Wood in delivering judgment, made some important observations. "I should have been glad," he said, "if the doctrine had been confined to the class of cases in which it originated, where a settlor by marriage settlement makes provision for his family generally, limiting the estate to the eldest son in tail, giving the usual powers for jointures and portions (though, even when this is not done, the son might still make any provision he pleased on attaining his majority), and then going on to charge the settled estate in favour of younger children. In such cases it is reasonable enough to regard the limitations for younger children as intended for the benefit not merely of those who happened to be younger children at the time of vesting, but of those who might fill that character when the fund should come into possession. A settlor under such circumstances may fairly be presumed to provide for the whole of his family, and younger children would in such an instrument naturally be taken to mean those who should not otherwise be provided for. But the moment you extend the doctrine to other cases where the provision for younger children is made by some person *in loco*

parentis, not by marriage settlement, but by some independent deed, you have an extremely different case to deal with. When the rule is laid down thus broadly, it includes cases where the effect of it may be to render it impossible, for a second son marrying in his father's lifetime, to make any jointure or settlement, except on a contingency. Still the cases, to whatever extent they may go, have not been carried beyond those where the donor is, if not a parent, at any rate *in loco parentis*. No authority goes so far as to apply the rule to a person, not a relative of those for whom provision is made, and not having any interest in the family estate. But here Sir Thomas Ramsay had nothing to do with the family or the estate." The substantial ground for the Court's decision in this case was that the younger child (who was declared entitled to the portions though he also took the estate) did not take the estate by any title derived from the persons who created the portions. And see *Cooper v. Cooper*, 8 L. R. Ch. App. 813.

(*a*) *Lord Teynham v. Webb*, 2 Ves. sen. 198; as to a grandfather standing *loco parentis*, see *Farrer v. Barker*, 9 Hare, 737; *Swallow v. Binns*, 1 K. & J. 417.

(*a*) *Duke v. Doidge*, 2 Ves. sen. 203, note.

nephew," &c., and he laid it down broadly that "every child except the *heir* is considered a younger, and that *eldership* which does not carry the *estate* along with it is not such an eldership as will exclude from sharing in the portions." From this judgment may be inferred the principle that where the settlor (whether a parent, or standing in *loco parentis*, or a *stranger*) settles an estate upon a particular family, and means to provide for all the family by limiting the estate to one and portions to the others, there no one of them shall under the same settlement take the estate and a portion also, but in such cases the Court will, if necessary, disregard the strictly literal meaning of the words eldest and younger, and carry out the substantial intention.

9. **General rule.**— This point however remains to be settled, and the only general rule to be laid down at present is that where the settlor is the parent or stands *loco parentis*, and portions are provided for younger children, and the estate upon which the portions are charged devolves (before the time for distribution of the portions) on one of the children, under the same settlement or under a settlement incorporated into it (*b*), there the words "eldest child" and "younger children" are capable of what has been called "a prodigious latitude of construction," viz., an eldest may be treated as a younger, and a younger as an eldest; but that where portions are provided for younger children, and the estate either does not devolve before the time for distribution of the portions on any of the children, or does not so devolve under the settlement creating the charge or a settlement incorporated in it by recital or otherwise, there the words "eldest child" and "younger children" receive their ordinary and natural interpretation.

Secondly. Who are meant by younger children where the estate charged is not settled on an "eldest" son.

1. **Where no one is made an eldest son.**— We now proceed to the cases where a settlor provides portions for younger children generally, without the ingredient that one [*393] is *to take the estate and the others to have the

(b) See *Stanhope v. Collingwood*, 4 L. R. Eq. 286; *Collingwood v. Stanhope*, 4 L. R. H. L. 43.

charge. Here the ordinary rules of construction apply, and "eldest" is taken to mean the eldest actually, and "younger" to mean the younger actually (*a*), and the time for ascertaining who is eldest and who are younger is not the period of *distribution* but the period of *vesting*.

Thus in *Adams v. Adams* (*b*) Sir W. Curtis, the father of Emma Adams, bequeathed 6,000*l.* to trustees in trust for Emma Adams for life, and after her decease "in trust for the children born or to be born of Emma Adams, who not being an eldest or only son for the time being," should as to sons attain twenty-one, or as to daughters attain twenty-one or marry, in equal shares. Emma Adams died in 1857, and there were eight children. Henry William the eldest attained the age of twenty-one in 1826, and died in 1854, in the lifetime of his mother. George the second son attained twenty-one in 1828, and at the death of his mother was the eldest son. The question was whether the words "eldest son" meant eldest at the time of the first portion vesting, or eldest at the time of its falling into possession; that is, whether George was or not entitled to a share. The M. R. adopted the principle laid down by Sir T. Plumer, viz., that there cannot be two periods, one for ascertaining who compose the class to take, and the other for ascertaining who are to be excluded (*c*); and that as George was not the eldest son when he attained twenty-one, he took a vested interest, and that the interest being once vested there was nothing to divest it, except to a limited extent by the attainment of vested interests by the other younger children.

2. **Exceptions.**—To the general rule that the eldest son in these cases is to be ascertained not at the time of *distribution* but at the time of *vesting*, there may be exceptions as in *Livesey v. Livesey* (*d*), with reference to which the M. R. observed, "a testator *may* say 'I do not intend any child to take a share unless at the period of distribution he shall ful-

[(*a*) *Domville v. Winnington*, 28 Ch. D. 382.] try, 15 L. R. Ir. 101.] But see *Re Rivers' Settlement*, 40 L. J. N. S. Ch.

(*b*) 25 Beav. 652; *Matthews v. Paul*, 3 Sw. 328; *Lyddon v. Ellison*, 19 Beav. 565; [*Domville v. Winnington*, 26 Ch. D. 382; *Longfield v. Ban-* 87. (*c*) *Matthews v. Paul*, 3 Sw. 328. (*d*) 18 Sim. 33; 2 H. L. Ca. 419.

fil the condition of not being an eldest son.' In *Livesey v. Livesey* the class was to be ascertained when the youngest child attained twenty-one, and there was a direction that the son who was or should become an eldest son should not take anything under the devise or bequest, and consequently the person who filled the character of eldest son at that period could not take. Unless the testator has said, 'I do [*394] not intend a person * to take any interest who at the time of *distribution* fills the character of eldest son,' I think the character of eldest son is to be ascertained when the interest becomes vested" (a).

Thirdly. At what time the portions vest.

1. *General rule as to vesting.* — In every well drawn settlement whether by deed or will, the period of vesting is clearly expressed upon the face of the instrument itself, and the usual period is as to sons at twenty-one, and as to daughters at twenty-one or marriage, with a declaration that the portions are not to be payable until after the death of the tenants for life, unless with the consent of the tenants for life. It often happens, however, that the language of the instrument is contradictory or inconsistent, or in some way ambiguous, and in order not to defeat the probable intention a peculiar and important canon of construction has been established; and it is this — Where a parent or a person standing *loco parentis* provides portions for children, the strong presumption is that he means to provide portions for all such children as may live to require it, *i.e.* for sons who attain twenty-one, and daughters who attain twenty-one or marry. If, therefore, the language of the instrument be uncertain but is capable of the construction, that sons at twenty-one, and daughters at twenty-one or marriage, shall take a vested interest, the Court will so decide it by force of the presumption.

Thus, in *Howgrave v. Cartier* (b) a fund was vested in trustees upon trust for Peter for life, subject to 200*l.* pin-money to Elizabeth his intended wife, and if Elizabeth should die before Peter, "without *leaving* any child or chil-

(a) 25 Beav. 656.

(b) 3 V. & B. 79.

dren, or leaving such they should all die under twenty-one, then to pay any sum not exceeding 3,000*l.* as Elizabeth should appoint. But in case Elizabeth survived Peter then in trust for Elizabeth for life, and after the decease of the survivor in case there should happen to be any child or children of their two bodies *living*, who should attain twenty-one, then in trust for such child or children attaining twenty-one as Elizabeth should appoint, or in default as Peter should appoint, and in default among such children equally. Peter died leaving Elizabeth his widow and two children, John and Mary. Elizabeth appointed the fund between John and Mary, and then John having attained twenty-one died in the lifetime of his mother, and then Elizabeth died leaving Mary her only child. The question was whether Mary, as the only child who survived her mother, was not absolutely entitled to the whole fund, to the exclusion of John who had died in her lifetime. Sir W. Grant observed, "If the settlement clearly * and [*395] unequivocally makes the right of a child to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision, usually as to sons at the age of twenty-one, and as to daughters at that age or marriage." And after commenting upon the various clauses contained in the settlement he came to the conclusion that John was entitled to the share appointed to him.

So in *Swallow v. Binns (a)*, Nathaniel Binns made a voluntary settlement by which a trust fund was limited to himself for life, with remainder to his son George Binns for life, and after his decease in trust "for all and every of the children of the said George Binns, *which might be living at*

(a) 1 K. & J. 417.

the time of his decease," to be equally divided, and the shares of sons to vest at twenty-one and of daughters at twenty-one or marriage. Had the settlement stopped there those children only who survived George would have taken, but then followed other inconsistent limitations, namely, If *any* child being a son died under twenty-one, or being a daughter died under twenty-one unmarried, the share of such child was to survive to the other or others; "and in case all such of the children of the said George Binns as were sons should die under twenty-one, and all such of them as were daughters under that age without having been married," then the trust fund was to be held in trust for other persons. Nathaniel died in 1822 and George in 1851, having had six children, all of whom attained twenty-one, but two of them died in his lifetime, and the question was whether such two were entitled to share with the four who survived George. Vice-Chancellor Wood observed, "The rule applies not only to settlements but also to the case of a will, so far as it provides for children towards whom the testator places himself in *loco parentis*. In this case the grandfather is providing for his children and grandchildren in such a manner, as throughout to place himself, with regard to the grandchildren, in the position of one who is performing a father's part, and providing what are expressly stated to be portions in one part of the settlement, and what, without that expression, would, I apprehend, be regarded as portions for his several grandchildren. The canon of construction to which I [*396] have *referred may be thus stated: That whereas in the case of ordinary instruments an express estate thereby limited cannot be enlarged, except by necessary inference, yet, upon instruments of this description, there is an implication of law arising upon the instrument itself, subject of course to any expressions to the contrary, that it is the intention of any person who places himself in *loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when those portions will be wanted, namely, upon their attaining the age of twenty-one years, or (as is usually provided in the case of daughters) upon their attaining twenty-one or marriage; and that such

portions shall then vest whether the children do or do not survive their parents. It is thought to be an unnatural supposition that the circumstance of such children or grandchildren predeceasing their parents, should have been contemplated as depriving them of the whole of the portion intended for their benefit. What the Court has said is this, that you do not require a *necessary* implication to arrive at the conclusion, that all children, who being sons attain twenty-one, or being daughters attain that age or marry, were intended to take, irrespectively of the question whether they survive their parents or not, and that if you find upon the face of the settlement a clause which renders it *doubtful* whether it was intended that all such children should take, or that those only should take who might survive their parents, the Court leans strongly in favour of the previous supposition, namely, that the probable intention of a person making a settlement would be in favour of the vesting at such fixed period, independently of the question of survivorship. On the other hand the rule is not one of arbitrary construction; the Court does not go out of its way by a forced construction to raise this implication; it must find an implication upon the natural and plain construction of the words in the settlement." And the Vice-Chancellor, applying these principles to the case before him, came to the conclusion that the two children who predeceased George their father were entitled to shares. The general principles laid down in the two foregoing examples have been approved and acted upon in numerous other cases (a); [and the rule applies as well to portions created by will as to those created by deed (b).]

*** 2. Presumption overcome by the language.** — But [*397] strong as the presumption is in favour of portions vesting in children at an age when they require it, yet if the

(a) *Emperor v. Rolfe*, 1 Ves. sen. 208; *Powis v. Burdett*, 9 Ves. 428; *Remnant v. Hood*, 27 Beav. 74; *Perfect v. Curzon*, 5 Mad. 442; *Torres v. Franco*, 1 R. & M. 649; *Woodcock v. Dorset*, 3 B. C. C. 569; *Hope v. Lord Clifden*, 6 Ves. 499; *Bythessea*

v. Bythessea, 23 L. J. N. S. Ch. 1004; *In re Goddard's Trusts*, 5 I. R. Eq. 14; [*Wakefield v. Richardson*, 13 L. R. Ir. 17.]

[(b) *Jackson v. Dover*, 2 H. & M. 209; *Re Knowles*, 21 Ch. D. 806.]

language of the instrument be clear and unambiguous, that the vesting of portions in sons who attain twenty-one or in daughters who attain twenty-one or marry is to depend on some contingency, as the event of their surviving their parents, the Court cannot contradict the written instrument (a).

3. **Where portional fund has to be created.** — A distinction must also be made between those cases where the portional fund exists or is to be raised at all events, so that the question relates only to the distribution of the fund, and those cases where the fund itself is to be called into existence upon a contingency, so that the latter contingency leavens all the portions and makes them all contingent.

Thus in *Hotchkin v. Humfrey* (b) a term of 500 years was created in trust that "*in case the husband should leave one or more younger children that should be living at the decease of the survivor of the husband and wife,*" the trustees were to *raise* portions for "*such* younger children," the same to be paid to daughters at the age of eighteen or marriage, and to sons at twenty-one; and should there be no such son or daughter then the term to cease. There were four children of the marriage who attained twenty-one, but two only survived both parents. Was the portional fund to be divided between the four or given to the two who survived? Sir T. Plumer said, "If the children who died before the surviving parent are to be considered as having taken vested interests, it must follow that a vested interest was given on a contingency. Can that be? When a fund is contingent the shares to be paid out of it must be contingent. If all the children had died before the surviving parent, the fund would not have been raisable, and therefore till such parent's death it was uncertain and contingent whether it could be raised. The intention appears to me, therefore, to have been

(a) *Re Wollaston's Settlement*, 27 Beav. 642; *Jeffery v. Jeffery*, 17 Sim. 26; *Bradley v. Powell*, Cas. t. Talb. 193, but doubted by Lord Hardwicke, in *Tunstal v. Bracken*, 1 B. C. C. 124, note; *Fitzgerald v. Field*, 1 Russ. 430; *Bright v. Rowe*, 3 M. & K. 316;

Skipper v. King, 12 Beav. 29; *Whatford v. Moore*, 7 Sim. 574; *Farrer v. Barker*, 9 Hare, 737; and see *Worsley v. Granville*, 2 Ves. sen. 333.

(b) 2 Mad. 65; and see *Swallow v. Binns*, 1 K. & J. 426; *Fitzgerald v. Field*, 1 Russ. 430.

to provide only for such children as should survive the surviving parent."

4. **Where vesting not provided for by the settlement.**—Where the settlement is silent as to the vesting of the portions, the Court has to fall back upon general principles, and *Remnant v. Hood* (c) is an important case upon this head. A testator devised *his estate to Samuel [*398] Thorold for life, with remainder to his first and other sons successively in tail, with remainder to his first and other daughters successively in tail, and enabled the tenant for life to charge 2,000*l.* for the portions of his younger children. S. Thorold accordingly upon his marriage charged 2,000*l.* to be raised within three months from his decease in favour of his younger children, but gave no directions as to the time of vesting. There was issue of the marriage a son and six daughters; the son died an infant in the father's lifetime, so that on the death of the father the eldest daughter became tenant in tail in possession. Two others of the daughters died infants in their father's lifetime, and the three remaining daughters married and attained twenty-one and two of them survived the father, but the other died in his lifetime. It was conceded by the counsel that the infants who died in the father's lifetime would take nothing, though *L. J. Knight Bruce* entertained a doubt (a). But as to the one who attained twenty-one and died in the father's lifetime, it was contended that the portion as a charge upon land had by the death of the portionist before the time for raising it sunk for the benefit of the estate. It was ruled, however, to the contrary, and the deceased child who had attained twenty-one and married was held entitled to participate. Lord Justice Turner, who applied himself to the points raised with his usual care, observed, "There are three periods at which the portions may have been intended to vest; the period of the birth of the children, the period at which they would require their portions (which, according to the ordinary habit in such cases as evidenced by the usual course of settlement, would be at twenty-one, or as to the daughters on marriage), and the period of the death of the

(c) 2 De G. F. & J. 396.

(a) See 2 De G. F. & J. 403.

parents. Looking both to the language and to the purpose of this instrument, I see nothing which in any way imports that the portions were not intended to vest during the lives of the parents, and to adopt the period of the death as the time of vesting would be to deprive the provision of that certainty which it must, I think, fairly be taken to have been the object of the settlement to secure. It would render the interests of the children contingent upon their surviving their parents, and deprive them of the means of making any certain provisions for their families during the whole of their parents' lives. This is a result against which the Court has struggled and successfully struggled in many cases, and I think therefore that we should not be justified in adopting this period as the time of vesting, in the absence of [*399] anything on the face of the *instrument indicating that it was so intended. Between the other two periods it is not as I have said necessary for us to decide, but I think it right to state that I lean to the opinion, that in this particular case the true period of vesting was at twenty-one, or as to the daughters on marriage. The consequence of holding the portions to vest at the birth would be that the shares of children dying in early infancy would go to the parent, thus contravening the purpose of the settlement, by giving to the father what was intended for the children, and the Court in these cases seems to have regarded rather the purpose than the words of the settlement"(a).

5. **General rule.**— Upon the authority of these and other cases it may be considered as established, that unless there be something special in the instrument (b), the portions of the younger children, whether they survive the tenant for life or not, will not vest in sons unless they attain twenty-one, or in daughters unless they attain twenty-one or marry (c); and that the shares of sons who attain twenty-one and of daughters who attain twenty-one or marry, will

(a) The whole of the judgment well deserves a perusal.

(b) See *Earl Rivers v. Earl Derby*, 2 Vern. 72.

(c) *Bruen v. Bruen*, 2 Vern. 439; S. C. Pr. Ch. 195; *Edgeworth v. Edgeworth*, Beat. 328; *Warr v. Warr*, Pr. Ch. 213; *Hinchinbroke v. Seymour*, 1

vest absolutely, so as not to be divested by subsequent death in the lifetime of the tenant for life (*d*).

6. **Vesting of portions.** — Where portions are expressly made to vest in sons at twenty-one, and in daughters at twenty-one or marriage, if any son or daughter die before that period the share sinks into the estate (*e*), even though the instrument direct the interest on the portion to be applied during minority towards that child's maintenance (*f*).

7. **Where raisable out of rents.** — Several cases, however, seem to have made good the exception that where no time is named in the settlement for vesting, and the portions are to be raised, not out of the *corpus*, but out of the annual *rents and profits*, and the rents and profits have begun to be available for the purpose, then the portionist takes a vested interest, though he dies in infancy (*g*). The portion must, as a whole, be either vested or not vested, and cannot be intermittent, *and therefore as the trust to [*400] raise the portion has commenced it must go on.

[8. **Appointment to infant.** — The question arose in the recent case of *Henty v. Wrey* (*a*), whether a power to appoint portions could be so exercised as to vest portions absolutely in children of tender years, and Kay, J., relying on *Lord Hinchinbroke v. Seymour* as reported by Brown (*b*), held that it could not, but that such an appointment would be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them. But this view was overruled on appeal, when the late M. R., after careful consideration of the case of *Lord Hinchinbroke v. Seymour*, came to the conclusion that it was really decided on the ground of fraud on the

B. C. C. 395; *Teynham v. Webb*, 2 Ves. sen. 209; *Davies v. Huguenin*, 1 H. & M. 730, see 743; [*Henty v. Wrey*, 19 Ch. D. 492;] and see *Evelyn v. Evelyn*, 2 P. W. 659, and the cases there cited; *Tunstall v. Bracken*, 1 B. C. C. 124, note; *Mayhew v. Middleditch*, 1 B. C. C. 162.

(*d*) *Davies v. Huguenin*, 1 H. & M. 730; *Macoubrey v. Jones*, 2 K. & J. 684.

(*e*) *Jennings v. Looks*, 2 P. W. 276; *Boycot v. Cotton*, 1 Atk. 552.

(*f*) *Hubert v. Parsons*, 2 Ves. sen. 261.

(*g*) *Evelyn v. Evelyn*, 2 P. W. 659; *Cowper v. Scott*, 3 P. W. 119; *Earl of Rivers v. Earl of Derby*, 2 Vern. 72.

[(*a*) 19 Ch. D. 492; 21 Ch. D. 332.]

[(*b*) 1 B. C. C. 395.]

power, and was no authority in support of the view that the power could not be exercised in favour of infants; and Lindley, L. J., laid down the following rules as the result of his examination of the authorities (c):—

“1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorise appointments vesting those portions in the appointees before they want them—that is, before they attain twenty-one, or (if daughters) marry.

2. That where the language of the power is clear and unambiguous, effect must be given to it.

3. That where upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

4. That where upon the true construction of both instruments the portion has vested in the appointee, the portion is raisable, even although the appointee dies under twenty-one, or (if a daughter) unmarried.

5. That appointments vesting portions charged on land in children of tender years, who die soon afterwards, are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so.”]

Fourthly. Of Ademption and Satisfaction.—The question who are portionists involves the doctrine of Ademption and Satisfaction, and we propose briefly to state the leading principles.

[*401] *1. **Ademption and satisfaction.**—The nature of Ademption and Satisfaction may be best illustrated by instances. A father by his will bequeaths 1,000*l.* to a daughter, and after the date of the will he settles 1,000*l.* upon the same daughter upon the occasion of her marriage, and dies without having altered his will. Here the father, owing a debt of nature to his daughter (a), had originally

[(c) 21 Ch. D. 359.]

Cr. 34; *Powell v. Cleaver*, 2 B. C. C.

(a) See *Watson v. Earl of Lincoln*, 516; *Cooper v. Cooper*, 8 L. R. Ch. Amb. 326; *Pym v. Lockyer*, 5 M. & App. 813.

intended to satisfy the obligation by a bequest in his will, but before the will takes effect the marriage occurs, and he makes the like provision for her by act *inter vivos*. In such a case the Court presumes that the father did not mean to bestow *two* portions upon the daughter at the expense perhaps of his other children, but to substitute the one portion for the other. Equity therefore holds that the subsequent (b) advance is an *ademption* of the legacy. "Where," said Lord Eldon, "a parent or person standing *loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, makes an advance in the nature of a portion to the child, that will amount to an *ademption* of the gift by the will, and this Court will presume he meant to satisfy the one by the other" (c). *Ademption*, therefore, is where the will precedes, and the settlement follows.

If, again, a father by act *inter vivos* covenants to settle 1,000*l.* on the marriage of his daughter, and afterwards either by act *inter vivos* (d) or by will gives 1,000*l.* to the same daughter, here the Court leaning against double portions precludes the daughter (in the absence of evidence to the contrary) from taking both the marriage portion and also the subsequent gift or legacy, and puts her to her election which one of the two she will prefer (e). *Satisfaction* therefore, is where the settlement precedes and the gift or legacy follows. It might have been wise, as observed V. C. Wood, if the rule had never been applied where the settlement is anterior to the gift or will, as the testator or donor might well be said to know what had been previously done (f). But the law is established otherwise, and in general terms *Satisfaction* may be defined to be the donation

(b) A gift prior to the will is no *ademption*, unless it be especially contracted for, see Taylor v. Cartwright, 14 L. R. Eq. 176.

(c) Trimmer v. Bayne, 7 Ves. 515.

(d) Jesson v. Jesson, 2 Vern. 255;

Thomas v. Kemys, 2 Vern. 348;

Keays v. Gilmore, 8 L. R. Eq. 290.

(e) Copley v. Copley, 1 P. W. 147;

Papillon v. Papillon, 11 Sim. 642;

Warren v. Warren, 1 B. C. C. 305,

&c.; Hyde v. Hyde, 2 Eden, 19;

Sparkes v. Cator, 3 Ves. 530, &c.;

Hinchcliffe v. Hinchcliffe, 3 Ves. 516;

Weall v. Rice, 2 R. & M. 251; Bruen

v. Bruen, 2 Vern. 439.

(f) Dawson v. Dawson, 4 L. R.

Eq. 513; per V. C. Wood.

of a thing with the intention that it is to be taken
[*402] * either wholly or in part, in extinguishment of some
prior (legal) claim of the donee (a).

2. **Persons loco parentis.** — The doctrine of Ademption and Satisfaction applies only as between parents (whether father or mother) (b), or persons *loco parentis* on the one hand, and children on the other. The doctrine does not hold as between strangers (c), or as between husband and wife (d), or as between brothers, or as between grandfather and grandchild, or as between uncle and nephew, or as between any other relatives than as above. But a brother may by his conduct place himself *loco parentis* to a brother (e), and a grandfather (f), uncle (g), or other relative or connection as a stepfather (h), may place himself *loco parentis* to a grandchild, nephew, or other relative or connection; and this though the person *loco parentis* has children of his own (i), and though the actual father be living and the child be resident with him and is maintained by him (j). So a *putative* father is not in law the parent of the illegitimate child (k), but he may place himself *loco parentis* by a course of conduct. And Lord Thurlow, in speaking of a parent's provision for a child, observed generally, "as to its being considered as the payment of a debt, the law does not

(a) *Chichester v. Coventry*, 2 L. R. H. L. 95, *per* Lord Romilly.

(b) *Finch v. Finch*, 1 Ves. jun. 534.

(c) *Powel v. Cleaver*, 2 B. C. C. 499. But even as between strangers "if a legacy appears on the face of the will to be bequeathed for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a presumption is made *prima facie* in favour of ademption," *per* Lord Selborne, L. C.; *Re Pollock*, 28 Ch. D. 552, 556.

(d) *Richardson v. Elphinstone*, 2 Ves. jun. 463; *Haynes v. Mico*, 1 B. C. C. 129; *Couch v. Stratton*, 4 Ves. 391.

(e) *Monck v. Monck*, 1 B. & B. 298.

(f) *Powys v. Mansfield*, 3 M. & Cr. 359; 6 Sim. 528; *Campbell v. Campbell*, 1 L. R. Eq. 383; *Pym v. Lockyer*, 5 M. & Cr. 29; and see *Roome v. Roome*, 3 Atk. 183.

(g) *Shudal v. Jekyll*, 2 Atk. 516.

(h) *Curtin v. Evans*, 9 I. R. Eq. 553.

(i) *Monck v. Monck*, 1 B. & B. 298.

(j) *Powys v. Mansfield*, 3 M. & Cr. 359 (see 368), reversing S. C. 6 Sim. 528; *Pym v. Lockyer*, 5 M. & Cr. 29; *Shudal v. Jekyll*, 2 Atk. 518.

(k) *Ex parte Pye*, 18 Ves. 140; *Grave v. Earl of Salisbury*, 1 B. C. C. 425; *Wetherby v. Dixon*, 19 Ves. 412, *per Cur.*; *Smith v. Strong*, 4 B. C. C. 493; *Jeacock v. Falkener*, 1 B. C. C. 295.

compel the parent to give the legacy; the Court can only mean a moral obligation, a laudable affection which may exist in *others* besides a *parent*" (*l*).

3. **How persons constituted loco parentis.**—By what acts a person will place himself *loco parentis* is a question upon which parol evidence is admissible (*m*), and is often in practice a question of extreme difficulty (*n*). According to Sir W. Grant, "A person *loco parentis* is one who assumes the parental character or discharges parental duties" (*o*). Sir L. Shadwell said, "The legal sense of the term is that the party has so acted towards the children, as that he has thereby imposed upon himself a moral obligation to provide for them" (*p*); and Lord Eldon speaks of him

* as "a person *meaning* to put himself *loco parentis*, [*403] in the situation of the person described as the lawful father of the child" (*a*); and Lord Cottenham attached great force in this description to the word "*meaning*," as referring to the *intention* rather than *the act* of the party (*b*), and added, that the definition was to be considered as applicable not to all the parental offices and duties (for they were infinitely various) but to such offices and duties as related to the making provision for a child (*c*). If a person has contributed to the maintenance of a female relative from the time of her father's death, and has been treated as one whose consent was necessary upon her marriage, and has taken upon himself the obligation of making a provision for her upon marriage, he must under such circumstances be regarded as having placed himself *loco parentis* (*d*).

4. **Presumption.**—Ademption and Satisfaction are both *Presumptions* only—that is, where there is no intrinsic evidence one way or another, the Court *presumes* that double portions were not meant. But if the Court collects from

(*l*) *Powel v. Cleaver*, 2 B. C. C. 516.

(*m*) *Powys v. Mansfield*, 6 Sim. 528; 3 M. & Cr. 359.

(*n*) See *Fowkes v. Pascoe*, 10 L. R. Ch. App. 350.

(*o*) *Wetherby v. Dixon*, 19 Ves. 412.

(*p*) *Powys v. Mansfield*, 6 Sim. 556.

(*a*) *Ex parte Pye*, 18 Ves. 154.

(*b*) *Powys v. Mansfield*, 3 M. & Cr. 367.

(*c*) *Ib.*

(*d*) *Booker v. Allen*, 2 R. & M. 270; *Pym v. Lockyer*, 5 M. & Cr. 29.

the *written instrument* that double portions were intended, no presumption arises, and therefore parol evidence cannot be let in to contradict the written instrument (*e*). Where there is no *intrinsic* evidence to the contrary the presumption arises, and then this presumption, like any other, may be rebutted by *extrinsic* or *parol* evidence, and of course counter evidence may be given to support and fortify the original presumption (*f*). There is no doubt that sometimes this presumption of law defeats the real intention, but as a general rule it effectuates the intention, and were it not for the doctrine under consideration, the provisions for families would often be most unjust, and the farthest from the settlor's actual wishes (*g*).

[*404] *5. *Subjects must be ejusdem generis.*—Ademption and Satisfaction are held to apply only where the properties which are the subject of the two gifts are *ejusdem generis*. A legacy of *money* will not be adeemed by a subsequent settlement of *land*; and a covenant to settle specific lands will not be satisfied by a subsequent settlement of money (*a*). A bequest of 10,000*l.* was not adeemed by a subsequent settlement of a beneficial lease (*b*), and a legacy of 500*l.* was not adeemed by a subsequent gift of stock in

(*e*) *Hall v. Hill*, 1 D. R. & W. 94; 1 Conn. & Laws. 120, in which all the previous cases are reviewed.

(*f*) Such is the result of the numerous authorities. The principal cases are *Kirk v. Eddowes*, 3 Hare, 509; *Booker v. Allen*, 2 R. & M. 270; *Lloyd v. Harvey*, Ib. 310; *Weall v. Rice*, 2 R. & M. 251; *Dawson v. Dawson*, 4 L. R. Eq. 511, *per* V. C. Wood; *Trimmer v. Bayne*, 7 Ves. 508; *Rosewell v. Bennet*, 3 Atk. 77; *Powys v. Mansfield*, 3 M. & Cr. 374, 378, *per* Lord Cottenham; *Monck v. Lord Monck*, 1 B. & B. 298; *Hartopp v. Hartopp*, 17 Ves. 184; *Ellison v. Cookson*, 1 Ves. jun. 100; *Robinson v. Whitley*, 9 Ves. 577; *Pole v. Lord Somers*, 6 Ves. 309; *Wallace v. Pomfret*, 11 Ves. 542; *Thellusson v. Woodford*, 4 Mad. 420; *Bell v. Coleman*, 5 Mad. 22; *Biggleston v. Grubb*,

2 Atk. 48; *Hoskins v. Hoskins*, Pr. Ch. 263; *Chapman v. Salt*, 2 Vern. 646; *Shudal v. Jekyll*, 2 Atk. 516; *Hale v. Acton*, 2 Ch. Rep. 35; *Cooper v. Cooper*, 8 L. R. Ch. App. 819; *Curtin v. Evans*, 9 I. R. Eq. 553; [*Tussaud v. Tussaud*, 9 Ch. D. 363; *Re Pollock*, 28 Ch. D. 552.]

(*g*) *Montefiore v. Guedalla*, 1 De G. F. & J. 103, *per* L. J. Turner.

(*a*) *Bellasis v. Uthwatt*, 1 Atk. 428, *per* Cur.; *Bengough v. Walker*, 15 Ves. 512, *per* Cur.; *Chichester v. Coventry*, 2 L. R. H. L. 96, *per* Cur.; and see *Barrett v. Beckford*, 1 Ves. sen. 520; *Masters v. Masters*, 1 P. W. 423; *Cooper v. Cooper*, 8 L. R. Ch. App. 819; [*Lewis v. Lewis*, 11 I. R. Eq. 340.]

(*b*) *Grave v. Lord Salisbury*, 1 Bro. C. C. 425.

trade upon the father's taking the son into partnership (*c*). But where a father covenanted upon the marriage of his son to pay 2,000*l.* by way of portion, and afterwards by his will bequeathed to his son certain powder works *and so much money* as when added to the powder works would make up the sum of 10,000*l.*, the amount in money required to make up the sum of 10,000*l.* was in fact an ordinary legacy, and was therefore applied in satisfaction of the marriage portion (*d*). [So where a father gave a bond for the payment of a sum of 10,000*l.* to his reputed son on a future day, and shortly before the day of payment took the son into partnership with him, and the articles provided that 19,000*l.* of the capital brought in by the father should belong to the son, it was held that the bond was satisfied (*e*).]

6. **Intention expressed.** — A legacy will not be adeemed by a subsequent advance if the latter be *expressed* to be in satisfaction of some other and quite different claim, as in satisfaction of a legacy under the will of a former testator (*f*), or if the subsequent advance be for a particular purpose, as to buy furniture (*g*).

7. **Legacies and advances.** — Legacies to a child are always regarded as *portions* unless it be otherwise expressed (*h*), and so are all advances *inter vivos* by a parent to a child unless the instrument itself show (as sometimes happens) that the second gift was *alio intuitu* and not meant as a portion (*i*).

8. **Advance of less amount.** — Where the subsequent advance is of *less* amount than the *previous [*405] legacy, it was for some time doubtful what would be the effect — whether the advance would adeem the *whole* legacy (*a*), or whether the doctrine of ademption would be

(*c*) *Holmes v. Holmes*, 1 Bro. C. C. 555; [see *Re Lawes*, 20 Ch. D. 81.]

(*d*) *Bengough v. Walker*, 15 Ves. 507.

[(*e*) *Re Lawes*, 20 Ch. D. 81.]

(*f*) *Baugh v. Reed*, 3 B. C. C. 192.

(*g*) *Robinson v. Whitley*, 9 Ves. 577.

(*h*) *Ex parte Pye*, 18 Ves. 151, per Lord Eldon; *Shudall v. Jekyll*, 2

Atk. 518, per Lord Hardwicke; *Pym v. Lockyer*, 5 M. & Cr. 35; *Ellison v. Cookson*, 1 Ves. jun. 107, per Lord Thurlow; *Leighton v. Leighton*, 18 L. R. Eq. 458.

(*i*) *Baugh v. Reed*, 3 B. C. C. 192; *Monck v. Monck*, 1 B. & B. 298; *Leighton v. Leighton*, 18 L. R. Eq. 458.

(*a*) *Hartop v. Whitmore*, 1 P. W.

excluded altogether, or whether it would be an ademption *pro tanto* or to the extent of the advance. It has now been settled that under such circumstances the subsequent advance will be an ademption *pro tanto*, so that the child can claim only the balance of the legacy (*b*).

9. **Residue.**—A share of a testator's *residuary estate* is regarded as a legacy to the amount of the share, and therefore if a testator bequeaths his residuary estate amongst his children and afterwards makes an advance in favour of a child, such advance, if it equal or exceed the amount of the share, will be an ademption of the whole share, and, if it be of less amount, will be an *ademption* of that child's share of the residue *pro tanto* (*c*). So if a parent make a provision for a child in his lifetime and afterwards bequeaths a residue to the same child, the amount of the residue will be an absolute or partial *satisfaction* to the amount of the residue (*d*).

10. **Codicil.**—It has been argued that where a testator gives a legacy to a child and then makes an advance, and then by a codicil *republics* the will, the original legacy shall be restored. But the Court has held the true construction of the codicil to be that the will is to have the effect which it would have had if the codicil had not been made except as altered by the codicil, and that as the double provision would not have taken place had the codicil not been made, it will not be set up by the codicil (*e*).

11. **Husband and issue.**—As a child's portion is commonly

681; *Ex parte Pye*, 18 Ves. 151; *Platt v. Platt*, 3 Sim. 512.

(*b*) *Pym v. Lockyer*, 5 M. & Cr. 29; *Kirk v. Eddowes*, 3 Hare, 509; *Ex parte Pye*, 18 Ves. 151, *per* Lord Eldon; *Montefiore v. Guedalla*, 1 De G. F. & J. 100, *per* Campbell, C.; *Re Pollock*, 28 Ch. D. 552. [If a father stands in the position of a mere debtor to his child, advances by him of sums less than the amount of the indebtedness are not *pro tanto* a satisfaction of the debt; *Reade v. Reade*, 9 L. R. Ir. 409.]

(*c*) *Dawson v. Dawson*, 4 L. R. Eq.

504; *Montefiore v. Guedalla*, 1 De G. F. & J. 93; *Stevenson v. Masson*, 17 L. R. Eq. 78; and see *Smith v. Strong*, 4 B. C. C. 493; *Freemantle v. Bankes*, 5 Ves. 79; *Smyth v. Johnston*, 31 L. T. N. S. 876.

(*d*) *Thynne v. Glengall*, 2 H. L. Ca. 131; *Earl of Glengal v. Barnard*, 1 Keen, 769; *Montefiore v. Guedalla*, 1 De G. F. & J. 103, *per* L. J. Turner; *Rickman v. Morgan*, 2 B. C. C. 394.

(*e*) *Booker v. Allen*, 2 R. & M. 270, see 300; *Lloyd v. Harvey*, *ib.* 310; *Monck v. Monck*, 1 B. & B. 298; and see *Roome v. Roome*, 3 Atk. 181.

settled upon the child for life with remainder to the *issue*, with a limitation in the case of a daughter to her *husband* for life, the Court regards the limitations to the issue, and in the case of a daughter the limitation of the life estate to the husband as parts of the provision for the child, so that not only the life estate of the child, but also the interests of the * children and husband are brought into [*406] the account as parts of the advance to the child (a).

If a father covenant to settle on his daughter and her children and then makes a bequest to her *children*, this is a satisfaction of the covenant as regards the children of the daughter (b). [So where under the father's covenant the children of a daughter became entitled as tenants in common, and the father gave legacies to one of the children of the daughter, and to two children of a deceased child of the daughter, it was held that the legacies were *pro tanto* a satisfaction of the covenant as to the interests of the legatees (c).] But if a father upon the marriage of his son covenant to settle a fund upon him and his wife and children, and in consideration thereof the *father of the wife* makes a settlement at the same time, and then the father of the son bequeaths a share of his estate to the *son*, the legacy to the son though a satisfaction of the son's interest under the father's settlement, is not a satisfaction of the interest of the son's *children* (d).

12. **Slight differences.** — The Court from its leaning against double portions will not allow *slight differences* in the limitations to rebut the presumption, and by slight differences are meant such as, in the opinion of the judge, leave the two provisions substantially of the same nature (e). The cases upon the subject have generally arisen with reference to

(a) *Kirk v. Eddowes*, 3 Hare, 509. Read the important observations of V. C. p. 521; *Platt v. Platt*, 3 Sim. 508; and see *Campbell v. Campbell*, 1 L. R. Eq. 383; *Russell v. St. Aubyn*, 2 Ch. D. 398; *Romaine v. Onslow*, 24 W. R. 899.

(b) *Campbell v. Campbell*, 1 L. R.

Eq. 383; [*Bennett v. Houldsworth*, 6 Ch. D. 671.]

[(c) *Bennett v. Houldsworth*, 6 Ch. D. 671.]

(d) *McCarogher v. Whieldon*, 3 L. R. Eq. 236.

(e) *Weall v. Rice*, 2 R. & M. 268, per Sir J. Leach; [*Tussaud v. Tussaud*, 9 Ch. D. 363.]

ademption (*f*), but the rule applies also to *satisfaction* (*g*). In the case of a *debt* (as distinct from a *portion*) said Lord Cottenham, small circumstances of difference between the debt and the legacy are held to negative the pre-
[*407] sumption of *satisfaction* (*h*), but in the * case of *portions* small circumstances are disregarded. Thus it is, that a smaller legacy is not held to be in satisfaction of part of a larger *debt*, but it may be satisfaction *pro tanto* of a *portion* (*a*). However, the differences in the limitations may be so great as to negative the presumption of satisfaction in case even of *portions* (*b*). If a father covenant on the marriage of his daughter to pay a sum by way of *portion*, and then by his will bequeaths to her a share of his residuary estate, but by the same will gives directions for payment of his debts, the presumption of *satisfaction* is negated by the direction for payment of debts, and then the *portion* is raised as a *debt*, while the daughter is also allowed to claim a share of the residue (*c*). But if a testator direct payment of his debts and gives a share of his residuary estate to a daughter and then makes an advance to her upon her marriage, the presumption of *ademption* is not negated by the direction for payment of debts in the previous will (*d*). Where a father is a debtor, not morally, but actually to his

(*f*) *Earl of Durham v. Wharton*, 3 Cl. & Fin. 146; 3 M. & K. 472; 5 Sim. 297; *Twisden v. Twisden*, 9 Ves. 427, *per* Lord Eldon; *Trimmer v. Bayne*, 7 Ves. 515, *per* Lord Eldon; cited with approbation, *Powys v. Mansfield*, 6 Sim. 561; *Powys v. Mansfield*, 3 M. & Cr. 374, *per* Lord Cottenham; *Weall v. Rice*, 2 R. & M. 251; *Platt v. Platt*, 3 Sim. 503; *Monck v. Lord Monck*, 1 B. & B. 304, *per Cur.*; *Lloyd v. Harvey*, 2 R. & M. 310; *Sheffield v. Coventry*, 2 R. & M. 317; *Hartopp v. Hartopp*, 17 Ves. 184; *Stevenson v. Masson*, 17 L. R. Eq. 78; [*Edgeworth v. Johnston*, 11 I. R. Eq. 326.]

(*g*) *Clark v. Sewell*, 3 Atk. 98, *per* Lord Hardwicke; *Thynne v. Glengall*, 2 H. L. Ca. 131; *Campbell v. Campbell*, 1 L. R. Eq. 383; *Sparkes*

v. Cator, 3 Ves. 530; *Russell v. St. Aubyn*, 2 Ch. D. 398; *Romaine v. Onslow*, 24 W. R. 809; [*Mayd v. Field*, 3 Ch. D. 587;] and see *Hartopp v. Hartopp*, 17 Ves. 191.

[(*h*) See also *Re Dowse*, 50 L. J. N. S. Ch. 285.]

(*a*) *Thynne v. Glengall*, 2 H. L. Ca. 131.

(*b*) *Coventry v. Chichester*, 2 De G. J. & S. 336; 2 L. R. H. L. 71; 2 H. & M. 149; [*Tussaud v. Tussaud*, 9 Ch. D. 363.]

(*c*) *Chichester v. Coventry*, 2 L. R. H. L. 71; 2 De G. J. & S. 336; 2 H. & M. 149; *Lethbridge v. Thurlow*, 15 Beav. 334; *Paget v. Grenfell*, 6 L. R. Eq. 7; *Alleyn v. Alleyn*, 2 Ves. sen. 37.

(*d*) *Dawson v. Dawson*, 4 L. R. Eq. 504.

child, as for money advanced by the child or on any other account, a bequest by the father to the child is no satisfaction, where it would not be a satisfaction as between the father and a stranger (*e*), but what would be a satisfaction as between strangers, will also be a satisfaction as between father and child (*f*).

13. **Contingent legacy.**—A *contingent* legacy bequeathed by a father will not be a satisfaction of a *vested* interest in the child under a previous settlement (*g*).

14. **Strangers may be benefited.**—A *stranger* may indirectly derive advantage from the doctrine of ademption, as where a testator gives a legacy to the child, and the residue to strangers, and then in his lifetime advances the child beyond the amount of the legacy. Here the ademption of the legacy swells the *quantum* of the residue for the benefit of the residuary legatees. This arises not from the application of the doctrine, but in spite of it, and therefore, where a testator bequeaths his residue equally between his wife or a stranger, and his child, and then advances the child in his lifetime, here the advance is not brought into account so as to augment the residue for the benefit * of the wife [*408] or stranger, but the wife or stranger can claim only the moiety of the actual residue (*a*).

15. **Ademption and satisfaction distinguished.**—Ademption and satisfaction are often confounded, but one broad distinction between them must not be lost sight of. Where the will precedes and the settlement follows, the settlement is an actual *extinguishment* of the claim under the will. But where the settlement precedes and the will or gift follows, here as the settlement created a legal obligation or vested a legal right by act *inter vivos*, the subsequent testamentary disposition cannot annul it, but all that equity can do is to put the parties entitled under the legal obligation or legal gift, to their *election*. Thus a testator bequeaths 1000*l.* to

(*e*) *Tolson v. Collins*, 4 Ves. 483; 352; *Chichester v. Coventry*, 2 L. R. Fairer *v. Park*, 3 Ch. D. 309. H. L. 96, *per* Lord Romilly.

(*f*) *Edmunds v. Low*, 3 K. & J. 318. (*a*) *Meinertzhagen v. Walters*, 7 L. R. Ch. App. 670; [and see *Stewart v. Stewart*, 15 Ch. D. 539.]

(*g*) *Bellasis v. Uthwatt*, 1 Atk. 426; *Hanbury v. Hanbury*, 2 B. C. C.

his daughter, and afterwards on the daughter's marriage settles 1000*l.* upon her. Here the will is considered as revoked, and the claims under the will are actually extinguished. If on the other hand, a father covenants on the daughter's marriage to settle 1000*l.* upon her and afterwards by will bequeaths 1000*l.* to the daughter, here the legal obligation under the settlement remains, and the daughter if she chooses may insist on her claims under the settlement. But if she does so, the Court will not also allow her to claim under the will, or in other words the Court puts her to her election (*b*).

SECTION II.

WHAT AMOUNT IS RAISABLE UNDER THE HEAD OF PORTIONS.

This question arises as to capital and interest, and maintenance money and costs.

1. **Capital.** — As to the amount of *capital* to be raised, the instrument itself generally prescribes the sum with sufficient exactness, and according to the common form now adopted in settlements, the amount graduates according to the number of children, *i.e.* a certain sum if there be only one younger child who takes a vested interest, an increased sum if there be two such children, and a larger sum still if there be three or more such children.

[*409] *2. **Ambiguity.** — Occasionally the settlement has been so ambiguously expressed with reference to the events contemplated, that recourse to the Court has become necessary. Thus, in *Hemming v. Griffith* (*a*), the trust was that if there should be one younger child the trustee should raise 8,000*l.*, and if two younger children 12,000*l.*, and if three or more younger children 15,000*l.*, the said portions to be paid as the husband and wife or the survivor should appoint, and in default of appointment the portions to vest

(*b*) *Chichester v. Coventry*, 2 L. R. H. L. 90, *per* Lord Romilly; *Russell v. St. Aubyn*, 2 Ch. D. 398; *Thomas v. Kemys*, 2 Vern. 348; *Copley v. Copley*, 1 P. W. 147; *Byde v. Byde*, 2 Eden, 19. As to interest on the advance made after the date of the will, see the decree in *Beckton v. Barton*, 27 Beav. 106.
(*a*) 2 Giff. 403.

in sons at twenty-one, and in daughters at twenty-one or marriage, and the settlement contained powers of maintenance and advancement out of the portions after the death of the parents, or in their lifetime with their consent. There were three younger children, but two of them died in infancy; and the question was whether the one who attained twenty-one was entitled to the 8,000*l.* or the 15,000*l.* Sir J. Stuart said, "It seems clear enough that if there should be three or more younger children, during the infancy of the three children the trusts for raising the 15,000*l.* were to have an operation and might be resorted to for the purposes of advancement and maintenance. If so, how can anything which has happened since the three younger children were born, reduce the trust for raising 15,000*l.* to a trust for raising 8,000*l.* only which was to be raised expressly, and in terms, in the event of there being only one younger child?" and the surviving portionist was declared entitled to the 15,000*l.*

3. *Interest.*—The right to interest and the rate of it, and the time from which it is to be calculated, should all be specified in the settlement, but in the absence of any express direction, a portion like any other sum of money charged on land, will carry interest with it by implication from the time when the capital ought to have been raised (*b*), and this interest will in England be at 4 per cent. (*c*); and in Ireland at 5 per cent. (*d*). But if the settlement while it is silent as to the interest on the portions, expressly and carefully and with all necessary circumstantiality provides for the interest on all the other charges, the presumption arises that interest on the portions was intentionally excluded, and the Court considers the general rule as inapplicable (*e*).

* 4. *Out of rents.*—In the rare case where the portions are to be raised not by sale or mortgage out of

(*b*) *Evelyn v. Evelyn*, 2 P. W. 609, *per Cur.*; *Hall v. Carter*, 2 Atk. 358, *per Cur.*; *Earl Pomfret v. Lord Windsor*, 2 Ves. sen. 487, *per Cur.*

(*c*) *Young v. Waterpark*, 13 Sim. 199; affirmed 15 L. J. N. S. Ch. 63; [*Balfour v. Cooper*, 23 Ch. D. 472.]

(*d*) *Purcell v. Purcell*, 1 Conn. & Laws. 371; [*Balfour v. Cooper*, 23 Ch. D. 472;] and see *Young v. Waterpark*, 13 Sim. 199; *Denny v. Denny*, 14 L. T. N. S. 854.

(*e*) *Clayton v. Earl of Glengall*, 1 Dr. & W. 1; S. C. 1 Conn. & Laws. 311.

the corpus of the estate, but out of the annual rents and profits, the Court looking to the hardship of allowing the interest to accumulate for years against the income, raises the capital only and gives no interest (*a*).

5. **Interest given, though portion not vested.** — Where there is the relation of father and child, or of a person standing *loco parentis* and a child, the natural duty and therefore the presumed intention of providing for the child is so strong as to have led to the establishment of peculiar principles. Some of these have already passed under review, and another is this:

Maintenance. — A *legacy* given to a *stranger* and payable at the age of twenty-one carries no interest in the meantime, but a legacy to a child being an infant (*b*) and payable at twenty-one, if maintenance be not otherwise provided for the child (*c*), carries interest with it (*d*) from the death of the testator, and not as in ordinary legacies from the expiration of one year from the testator's death (*e*). So a *portion* charged on land in favour of a child, whether made payable at a particular age or without any direction as to payment, will carry interest with it from the death of the testator.

Rate of interest. — But as the rate of interest is discretionary, the Court has not considered itself bound by the general rule of 4 per cent., but has regulated itself by the circumstances of each particular case. The application of these principles will be best understood by the following instances:

In *Warr v. Warr* (*f*) a father charged the estate with portions for younger children, "to be paid at *such time* as the trustees should *appoint* for their better maintenance and preferment." There were three younger children, a son and two daughters. The son was apprenticed to a sea captain

(*a*) *Ivy v. Gilbert*, 2 P. W. 18; *Evelyn v. Evelyn*, 2 P. W. 659. But see *Ravenhill v. Dansey*, 2 P. W. 179.

(*b*) *Raven v. Waite*, 1 Sw. 558.

(*c*) *Mitchell v. Bower*, 3 Ves. 287; *Long v. Long*, *Ib.* 286, note; *Wynch v. Wynch*, 1 Cox, 438.

(*d*) See *Crickett v. Dolby*, 3 Ves. 16; *Raven v. Waite*, 1 Sw. 557; *Beck-*

ford v. Tobin, 1 Ves. sen. 308; *Hill v. Hill*, 3 V. & B. 183; *Tyrrell v. Tyrrell*, 4 Ves. 1; *Chambers v. Goldwin*, 11 Ves. 1; *Lowndes v. Lowndes*, 15 Ves. 301.

(*e*) *Cary v. Askew*, 1 Cox, 241; *Mole v. Mole*, 1 Dick. 310.

(*f*) *Pr. Ch.* 213.

and a sum paid by the trustees for his outfit; the two daughters attained twenty-one and received their portions. The son died under age before the trustee had named any day for payment of his portion. It was ruled that the son's portion was not to be raised, as he had not lived to want it; but it was "agreed that all the children were to be maintained out of the trust estate, they having no maintenance in the meantime, and what had been employed for putting out the younger son was to come out of the trust estate."

* In *Staniforth v. Staniforth* (a) an estate was settled on the father and mother successively for life, with remainder in default of issue male to trustees for a term of five hundred years in trust to raise 1,000*l.* for the daughters' portions, but *no time* was appointed for payment. The father died without issue male, leaving a daughter who filed her bill, living the mother, to have the 1,000*l.* raised. The M. R. held: 1. That by the failure of issue male the term had arisen, though not to take effect in possession until the death of the mother. 2. That the portion vested in the daughter in the lifetime of the mother (the daughter it is presumed having attained twenty-one); and 3. That no time being appointed for the payment of any portion, nor any maintenance in the meantime, she was entitled to a *reasonable maintenance not exceeding the interest of the portion from the death of the father*, or at the least from such time as the portion might have been raised by sale.

Beal v. Beal (b) was this: An estate was settled on the father and mother successively for life, with remainder to the father's brother in tail, &c., and a power to charge portions was limited to the father. He appointed the sum of 2,000*l.* for his two daughters, payable at eighteen or marriage, but without saying after the death of his wife, and then died. The two daughters, who were under eighteen, filed their bill in the lifetime of the mother, to have interest for their portions until raisable. Lord Harcourt decreed that they should have interest at 3 per cent. until they were twelve years old, and then 4 per cent. until the portions were raisable. Being

(a) 2 Vern. 460.

(b) Pr. Ch. 405.

dissatisfied with the rate of interest, they had the case reheard before Lord Cowper, who said he thought the former decree very tender in the provision thereby made, and that it was rather a recommendation to the mother to make them that allowance than a decree to charge her jointure therewith, but that since they were not satisfied, he must now give them no more than what in strict justice they could demand, and that since the portions were not payable till eighteen or marriage, he could not charge the jointress with interest thereof in the meantime, but that as the reason for postponing the payment till eighteen was in favour of the jointress, she *ought to maintain them* out of the profits of her jointure lands.

In *Harvey v. Harvey (c)* a testator charged all his real and personal estate with 1,000*l.* apiece to all his younger children, payable at twenty-one, but gave *no directions as to maintenance* in the meantime. The younger children during their

infancy filed their bill to be allowed interest or main-
[*412] tenance. The M. R. said * "that in this case the

Court would do what in common presumption a father if living would, nay, ought to have done, which was to provide necessities for his children, but a Court of Equity would make hard shifts for the provision of children, as where the younger children were left destitute and the eldest an infant, the Court would make such a liberal allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children. And for the same reason the Court would likewise take a latitude in this case, and that since interest was pretty much in the breast of the Court, though the will was silent with regard to that, yet it should be presumed that the father who gave these legacies intended they should carry interest if the estate would bear it, for every one must suppose it to have been the intention of the father that his children should not want bread during their infancy, but that where the estate appeared to be small, the Court, in whose discretion it always lay to determine the quantum of interest, had ordered the lower interest."

6. **General rule.** — It will be collected from the preceding cases that portions provided for children have this peculiar quality, that whether made payable at a certain age or not, they are so far contingent as not to be raisable, but to sink into the land, where the children do not live to want their portions — that is, where the children being sons do not attain twenty-one, or being daughters do not attain that age or marry; but that on the other hand portions are so far considered vested as to carry with them such a rate of interest or such allowance as the Court may deem necessary for the reasonable maintenance of the children.

7. **Costs.** — As regards the *costs* of raising portions the general rule as to charges applies, that is, the costs must be thrown on the estate, and the portions bear no part of them (a), and of course under the head of costs will be included all charges and expenses properly incurred.

SECTION III.

AT WHAT PERIOD THE PORTIONS ARE RAISABLE.

1. **Portions out of reversions.** — We have next to inquire at what *period* the portions are to be raised, and upon this subject the great contest has been whether they shall or not be raised while the security created for the purpose * is still *reversionary*. The cases are unusually nu- [*418] merous and extremely conflicting, and the only result to be obtained is that the question must be decided by the “penning of the trust,” or in other words, that if the instrument be unequivocal in itself as to the actual intention of the parties, the Court must carry out the intention whatever may be the consequential inconvenience. A sale or mortgage must necessarily be made at a disadvantage when the security is reversionary, but if the meaning be clear it must be done. We cannot better explain the principles by which the Court is now regulated, than by a statement of the two leading authorities.

(a) *Armstrong v. Armstrong*, 18 Beav. 549; *Trafford v. Ashton*, 1 P. L. R. Eq. 541; *Michell v. Michell*, 4 W. 415.

2. *Codrington v. Foley*. — In *Codrington v. Foley* (a) a testator devised an estate to trustees for ninety-nine years from the testator's decease, remainder to Lord Foley for life, remainder to other trustees for 1,000 years, to commence from the death of Lord Foley, for raising 30,000*l.* for portions of younger children, remainder to the first and other sons of Lord Foley in tail. The trusts of the term of ninety-nine years were for applying the rents with the proceeds of the timber in discharge of certain incumbrances. Lord Foley died in 1793, leaving an only son, and a daughter who became Mrs. Codrington. Mr. and Mrs. Codrington filed their bill to have the 30,000*l.* raised, and it was objected that the trusts of the term of ninety-nine years were still in operation and unsatisfied, and that the 1,000 years term was consequently reversionary both at law and in equity, and while so reversionary it could not be sold or mortgaged, to the great injury of the tenant in tail. Lord Eldon came to the conclusion that the 30,000*l.* must be raised, though the term for raising it was reversionary, and after reviewing the opinions of Lord Cowper, Lord Macclesfield, Lord Hardwicke, Lord Talbot, Lord Thurlow, and Lord Alvanley upon the subject (b), he proceeded, "Upon this general state of the doctrine of the Court, it appears to me that the proper rule is what Lord Talbot states — that the raising or not raising must depend upon the particular penning of the trust, and the intention of the instrument. I do not think the Court ought to be eager to lay hold of circumstances. The Court ought to hold an equal mind whilst construing the instrument, and I cannot agree with what is stated in *Stanley v. Stanley* (c) that very small grounds are sufficient. If they are sufficient to denote the intention, they are not small grounds. If they are not sufficient to denote the intention, the Court does not act according to its duty by treating them as sufficient, thereby disappointing the true [*414] *intention of the instrument. The rule upon the whole depends upon this, whether it was the intention, attending to the whole of it, that the portion should or

(a) 6 Ves. 384.

(c) 1 Atk. 549.

(b) The whole judgment well deserves a perusal.

should not be raised in this manner. If there be nothing more than a limitation to the parent for life, with a (reversionary) term to raise portions at the age of twenty-one or marriage, and the interests are vested and the contingencies have happened at which the portions are to be paid, the interest is payable and the portions *must be raised*, in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term" (a).

3. In *Codrington v. Foley* the term for raising the portions was reversionary upon another term, the trusts of which were unsatisfied: but in the case of *Smyth v. Foley* (b) it was reversionary upon the life estate of the father, and yet the same result followed.

Smyth v. Foley. — Thus an estate was limited by settlement upon marriage to R. Chambers for life, remainder to M. E. his wife for life in bar of dower, remainder to trustees for 500 years, remainder to the first and other sons successively in tail, and the trusts of the term were declared to be by sale or mortgage or other means to raise 4,000*l.* for the younger children, the portions "to be paid" at their respective ages of twenty-one years, and of daughters at those ages or marriage; and upon further trust "until the same portions should become payable as aforesaid, to raise a competent yearly sum out of the rents and profits," for maintenance and education, with a power "after the decease of Richard Chambers, or in his lifetime with his consent," to raise moneys for advancement. There were six children of the marriage, three sons and three daughters, all of whom attained twenty-one. After the death of M. E. Chambers the wife, but in the lifetime of R. Chambers, the younger children filed their bill to have the 4,000*l.* raised. Baron Alderson in giving judgment laid down the following rules: That *First*, where a term is limited in remainder to commence in possession after the death of the father, yet if the trust is to raise a portion payable at a fixed period, the child shall not wait for the death of the father before the portion is raised, but at the fixed period may compel a sale of the term (c).

(a) 6 Ves. 379.

(b) 3 Y. & C. 142.

(c) *Sandys v. Sandys*, 1 P. W. 707;*Hellier v. Jones*, 1 Eq. Ca. Ab. 337;

Secondly. Where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens (*d*). *Thirdly.* Where [*415] not only *the period but the class of children, in favour of whom the portions are to be raised, depends on a contingency (as when it is limited to take effect in case the father dies without issue male by his wife), there also on the contingency happening by the death of the wife without issue male the portions are raisable immediately, and the term is salable in the lifetime of the father (*a*). The Judge then expressed his entire concurrence in the principles laid down by Lord Eldon (viz. that the intention must be collected from the whole settlement taken together), and finding an express direction that the portions were to be paid at twenty-one or marriage, and that the settlement contained nothing at variance with that construction, he decreed the portions to be raised by sale or mortgage of the reversionary term.

4. *General rule and exceptions.*—Such are the general rules by which the Courts now profess to be governed. We must, however, add the caution that when the grounds upon which the Court acted in any case are not sufficient to warrant the decision upon a fair construction of the *instrument* itself, and independently of and apart from any arguments based on the *inconvenience* of burdening the estate, such case cannot at the present day be relied upon as an authority.

And *particular* and *special* cases have occurred in which the Court has refused to raise the portions out of a reversionary term.

Thus, in *Corbett v. Maidwell* (*b*), the estate was settled upon marriage on Thomas for life, remainder to trustees for

Bacon v. Clerk, Pr. Ch. 500; *Stanley v. Stanley*, 1 Atk. 549; *Conway v. Conway*, 3 B. C. C. 287; *Brome v. Berkley*, 2 P. W. 486, *per Cur.*; *Cotton v. Cotton*, 3 Y. & C. 149, note.

(*d*) As where the portions are to vest at such times as the father shall appoint and he has not yet appointed.

(*a*) *Hebblethwaite v. Cartwright*, For. 30; *Greaves v. Mattison*, 1 Eq.

Ca. Ab. 336; *Ravenhill v. Dansey*, 2 P. W. 180; *Smith v. Evans*, Amb. 633; *Staniforth v. Staniforth*, 2 Vern. 460. In other cases the contingency did not occur. See *Worsley v. Granville*, 2 Ves. sen. 331; *Hall v. Hewer*, Amb. 203; *Corbett v. Maidwell*, 1 Salk. 159.

(*b*) 1 Salk. 159.

500 years, remainder to the heirs male of the body of Thomas by his intended wife, "and if he died without issue male by his intended wife, and there should be one or more daughters which should be *unmarried or unprovided for at the time of his death*," then to raise portions for the daughter or daughters payable at eighteen or marriage with maintenance in the meantime. The wife died without issue male, but leaving a daughter who married, and she and her husband filed their bill to have the portions raised during the father's life. The Court refused the relief asked, on the ground that the portion was contingent on the daughter being unmarried and unprovided for at the father's death, a contingency which had not yet happened.

In *Butler v. Duncomb* (c), the marriage settlement limited the estate to George for life, remainder to Mary for life, remainder * to the first and other sons in tail [*416] male, remainder to trustees for 500 years upon trust, that the trustees should "from and after the *commencement of the term*" raise portions for the younger children payable at twenty-one or marriage; remainder to George in fee. George died, leaving a daughter the only issue, who married, and then she and her husband filed their bill to have the portion raised in the lifetime of the mother. But the Court declined to make any such order, as the trust was to raise the portion from and after the commencement of the term, which meant the commencement *in possession*, and that this implied a negative, viz. that it was not to be raised before.

In *Brome v. Berkley* (a) the marriage settlement was to George for life, remainder to the wife for life for her jointure, remainder to the first and other sons in tail, remainder to trustees and their heirs to raise portions for daughters, payable at twenty-one or marriage with *maintenance in the meantime*, "the first payment of the maintenance money to be made at such half-yearly feast as should next happen after the *estate limited to the trustees should take effect in possession*." The husband died leaving no issue but a daughter who attained twenty-one, and filed her bill in the mother's life-

(c) 1 P. W. 448; and see *Churchman v. Harvey*, Amb. 335.

(a) 2 P. W. 484. But see *Cotton v. Cotton*, 3 Y. & C. 149, note.

time, to have the portion raised. Lord King dismissed the bill, on the ground that the maintenance was not to be raised until the estate of the trustees came into possession, and "it was absurd to say that the portion should be raised first, and the maintenance money paid afterwards."

In *Stevens v. Dethick* (b) the estate was limited to Dethick for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to trustees for 500 years, to raise portions for daughters payable at twenty-one or marriage, with a direction that the daughters should have maintenance out of the premises comprised in the term "and that the residue of the rents, issues, and profits above such yearly maintenance should in the meantime, *till the portions became payable*, be received by such persons as should be entitled to the reversion expectant upon the determination of the said term." Lord Hardwicke considered the latter clause to show an intention, that the maintenance money and therefore also the portion itself was not to be raised until the term fell into possession. He therefore dismissed the bill filed by the only daughter after the death of her mother, but in the lifetime of her father.

[*417] *In *Massy v. Lloyd* (a) the estate was limited to trustees for 999 years upon trust for the wife for her life, and after her decease upon trust to pay an annuity to the husband, and to apply the *residue* of the rents during the husband's life, as the wife should appoint (a power which was executed), and on the death of the survivor of the husband and wife to raise 15,000*l.* for younger children's portions, and subject as above the estate was settled on the first and other sons in tail. The wife died, and it was held that the portions were not raisable during the life of the husband. The case was a very special one, but the argument that chiefly prevailed was based upon the fact that all the *rents, issues, and profits* during the lifetime of the husband had been *expressly disposed of otherwise*.

5. Hitherto we have averted only to the question whether

(b) 3 Atk. 39; and see *Reynolds v. Meyrick*, 1 Eden, 48. But see *Cotton v. Cotton*, 3 Y. & C. 149, note. (a) 10 H. L. Cas. 248; 11 Ir. Eq. Rep. 429; 12 Ir. Eq. Rep. 298.

portions shall be raised, while the term charged with them is still *reversionary*. But there are also other circumstances affecting the portionists *personally*, which have a material bearing upon the inquiry, at what time the portions are to be raised.

6. *Time of raising portions in special cases.*—If a specific sum be given to A., payable at her age of twenty-one, or day of marriage, the money cannot be raised until the interest has become vested; for should the fund on which the money raised is invested prove deficient, the portionist might still have recourse to the estate (*b*). And so where the trust of a term was to raise 3,000*l.* for younger children, payable at their respective ages of twenty-one years, or days of marriage, it was held that the trustees were not authorised, when one child had attained his age of twenty-one years, to raise the entire sum, for the infant children could not be deprived of the real security for their shares (*c*). But from the manifest convenience of raising the portions at once, it seems the Court will lean to that construction where anything appears upon the instrument to warrant such a course. Thus the trustees of a marriage settlement were directed, after the death of the husband, to levy and raise by mortgage, sale, or other disposition of the estate, if there should be more than three children, the sum of 10,000*l.* for their portions, the shares of the sons to be vested in, and payable to them at the age of twenty-one, and the shares of the daughters at twenty-one or marriage; and it was provided that *no mortgage should be made until some one of the portions should become payable*. Four of the children had attained

* twenty-one and three were under age; and the [*418] Vice-Chancellor said, “In this settlement there is a clause that no mortgage is to be made until some one of the portions shall become payable. The whole 10,000*l.* must therefore be raised at once. It is objected that some of the shares may become diminished in amount: the answer to that is, that the Court considers the investment in the 3 per cent. Consols as equivalent to payment. If there is any rise

(*b*) *Dickinson v. Dickinson*, 3 B. C. C. 19. (*c*) *Wynter v. Bold*, 1 S. & S. 507.

in the funds the children under age will have the benefit of it" (a).

SECTION IV.

IN WHAT MODE THE PORTIONS ARE TO BE RAISED.

Where an estate is settled subject to portions, the presumed intention is that the portions should impede as little as possible the devolution of the property in the main channel of the limitations. Moral duty requires that some support should be secured for the younger children, but this should be done at as little sacrifice as circumstances will allow to the family consequence as represented by the eldest son.

1. **Modes of raising portions.**—In raising portions, therefore, it is *primâ facie* undesirable to *sell* any part of the estate. So recourse should rather be had to levying the required amount by a side wind, as by the produce of *mines* or a fall of *timber*; or, if this cannot be done, then by a *mortgage* rather than by an absolute disposition, for though a mortgage is usually accompanied with a power of sale, so that eventually the property may pass into the hands of a stranger, yet until actual sale the owner under the settlement has the opportunity of paying off the charge from his private means. In every case, however, the language of the instrument must govern. If portions be simply *charged* on an estate, either expressly or by implication, (as where a charge is implied from a power limited to the portionist of distraining for non-payment (b),) the money may be raised by mortgage or sale as in the case of any other charge.

2. **Where a sale is excluded.**—A trust to raise the portions by *mortgage* will not authorise a *sale*, but if the trust be to levy the amount by mortgage or *otherwise* a power of sale is implied (c). If the trust be to raise the charge by and out of the rents or by such other ways and means *except* [*419] * a *sale* as the trustees may think proper, not only a sale is prohibited but a mortgage also which may lead

(a) Gillibrand v. Goold, 5 Sim. 149.

(c) Tasker v. Small, 6 Sim. 825.

(b) Meynell v. Massey, 2 Vern. 1.

to an absolute disposition, as it enables the mortgagee by foreclosure to get possession of the estate (*a*).

3. *Out of income or corpus.* — If the portions be raisable by and out of the *rents and profits or by mortgage*, here the words are ambiguous, and are capable of the construction that the trustees have an option of levying the portions either out of the income or out of the corpus, and so of throwing the onus at their discretion either upon the tenant for life or upon the remainderman (*b*). But the Court will lean strongly against such a construction (*c*). In some cases the meaning is that the annual rents should be primarily charged, and that the deficit only should be raised out of the corpus. Thus where the trustees were to hold an estate during the minority of the devisee, and to raise portions *by and out of the rents and profits or by sale or mortgage*, and on the devisee attaining the age of twenty-one to pay the rents to him after payment of the portions, the Court said that as the devisee on attaining twenty-one was to take such accumulated rents and profits only, as should remain after satisfying the portions, the testator intended that the rents and profits should be first applied, and that the balance only could be raised by sale or mortgage (*d*).

[Where the portions were raisable “by mortgaging or otherwise disposing of the lands, or out of the rents and profits, or by any other ways or means,” and unsuccessful efforts had been made to raise the portions by mortgage of the property, it was held that the trustees were at liberty to apply the rents and profits first in payment of the interest, and secondly in reduction of the capital of the portions (*e*).]

4. *Out of rents.* — A more common case is where the portions are directed to be raised out of the rents and profits simply, and nothing more is said. Here if a definite time be fixed for payment of the portions, the ordinary and *prima facie* meaning of rents and profits is taken to be inconsistent with the direction for payment at a time certain, and

(*a*) *Bennett v. Wyndham*, 23 Beav. 521.

(*b*) See *Hall v. Carter*, 2 Atk. 354.

(*c*) See the cases referred to, *ante*, p. 367.

(*d*) *Warter v. Hutchinson*, 1 S. & S. 276; and see *Okeden v. Okeden*, 1

Atk. 550.

[(*e*) *Balfour v. Cooper*, 23 Ch. D. 472.]

recourse is therefore had to the corpus by sale or mortgage. But even if a definite time of payment be not an ingredient in the case, yet from the very nature of portions, as rents and profits without stint represent the whole estate, [*420] the Court assumes the * jurisdiction of ordering a sale or mortgage (a); and where there is no suit pending the trustees of an estate subject to such a charge may sell or mortgage, if they can find a purchaser or mortgagee, without the intervention of the Court (b).

5. *Out of annual rents only.* — If, however, the clear intention be that *annual* rents and profits only are meant, the Court cannot break in upon the corpus; and such is the case where the portions are directed to be raised *expressly* out of the *annual* rents (c); or where it is evident from the whole context that by rents and profits were intended the *annual* rents (d).

6. *Out of rents or otherwise, except a sale.* — In *Bennett v. Wyndham* (e), where the trust was to raise the charge out of the rents and profits, or by *such other ways and means* except a sale as the trustees should think proper, the Court on the one hand collected an intention that annual rents and profits were meant, and on the other hand that the tenants for life were not to be deprived of all usufructuary enjoyment, and the Court adopted a middle course by holding that part of the rents should be impounded and part be handed over to the tenants for life, and referred it to cham-

(a) *Warburton v. Warburton*, 2 Vern. 420; *Sheldon v. Dormer*, 2 Vern. 310; *Baines v. Dixon*, 1 Ves. sen. 41; *Hall v. Carter*, 2 Atk. 358, per Lord Hardwicke; *Backhouse v. Middleton*, 1 Ch. Ca. 173; *Green v. Belcher*, 1 Atk. 505; *Trafford v. Ashton*, 1 P. W. 415; *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. jun. 234, per Cur.; *Okeden v. Okeden*, 1 Atk. 550; and see *Allan v. Backhouse*, 2 V. & B. 65; [*Re Barber's Settled Estates*, 18 Ch. D. 624;] *Bootle v. Blundell*, 1 Mer. 233 Anon. 1 Vern. 104, in which it was said that rents and profits could not receive

this enlarged construction in a deed; *Garmstone v. Gaunt*, 1 Coll. 577; *Lingon v. Foley*, 2 Ch. Ca. 205; *Mills v. Banks*, 3 P. W. 1.

(b) *Backhouse v. Middleton*, 1 Ch. Ca. 176, per Cur.

(c) Anon. 1 Vern. 104; *Solley v. Wood*, 29 Beav. 482.

(d) *Mills v. Banks*, 3 P. W. 1; *Wilson v. Halliley*, 1 R. & M. 590; *Ivy v. Gilbert*, 2 P. W. 13; *Evelyn v. Evelyn*, 2 P. W. 659, see 666; *Earl of Rivers v. Earl of Derby*, 2 Vern. 72; *Okeden v. Okeden*, 1 Atk. 550.

(e) 23 Beav. 521.

bers to inquire what proportion of the rents ought to be impounded, and what to be paid to the tenant for life.

7. **Mines and timber.** — In *Offley v. Offley* (f) a term was created for raising 10,000*l.* for a daughter's portion, but the term was so short that the ordinary *profits* of the land would not raise above half the sum. There was an open coal mine in the land which the Court ordered to be wrought, with powers to the trustees to make soughs and drains as need should require, and Lord Commissioner Hutchins said that in such a case where the *usual profits* of the land would not *raise the money appointed within the time*, the Court might order *timber* to be felled off the land to make up the amount.

8. **Out of rents by fixed annual payments.** — If the trusts of a term be to "raise and levy *from time to time* * a sum certain, by with and out of the rents and [*421] profits, by certain annual payments or sums in each year *and not otherwise*," the portional sum to be raised is a charge on the annual rents and profits generally, and the estate is not discharged at the expiration of six years, though the rents and profits during that period were sufficient to raise it (a).

9. **Mortgage of undivided shares of the estate.** — Where portions are raisable at different times as they are wanted, it is usual, as each portion is raised, not to mortgage the *entire* estate charged, but a proportional part only. Thus if the proportional sum be 6,000*l.* divisible among three younger children, and secured by a term of 1,000 years, when the first 2,000*l.* is raised, the trustee of the term mortgages an *undivided third part* of the hereditaments comprised in the term, and when the second 2,000*l.* is raised, another undivided third part, and when the remaining 2,000*l.* is raised, the other undivided third part. The result of this is, that each mortgage takes the *legal estate* in the subject of the mortgage, whereas if the entire estate had been comprised in the first mortgage, the two other securities would have been equitable, and exposed to all the consequent risks.

10. **Custody of title deeds.** — Trustees of a term of years

(f) Fr. Ch. 26.

(a) *Re Forster's Estate*. 4 L. R. Eq. 152.

for raising portions as between them and the freeholder are not entitled to the custody of the title deeds, and cannot deliver them to a mortgagee. But they and their mortgagees have a right in equity to the production of them for all necessary purposes (*b*).

11. 36 & 37 Vict. c. 66. — By 36 & 37 Vict. c. 66, s. 34, subs. 3, all causes and matters for raising portions are to be assigned to the Chancery Division of the High Court of Justice.

(*b*) *Churchill v. Small*, 8 Ves. 322, & J. 117; *Hotham v. Somerville*, 5 note (*b*); *Harper v. Faulder*, 4 Mad. Beav. 360.
129, 138; *Wiseman v. Westland*, 1 Y.

DUTIES OF TRUSTEES FOR SALE. (1)

THE subject of trusts for sale may be conveniently distributed under three heads: *First*, The general duties of trustees for sale; *Secondly*, The power of trustees to sign discharges for the purchase-money; and *Thirdly*, The disability of trustees to become purchasers of the trust property.

SECTION I.

THE GENERAL DUTIES OF TRUSTEES FOR SALE.¹

1. **Trustees may sell without applying to the Court.** — It need scarcely be observed that trustees for sale where they are not parties to a suit, are authorised to enter into contracts

[(1) It should be borne in mind that under the Settled Land Acts, restrictions are placed on the powers of trustees to sell settled land. This subject is dealt with in chap. xxiii. sect. 2, v. to which the reader is referred.]

¹ *Trustee for sale.* — If the trust instrument contains an express or implied power, the trustee need not apply to court for power to sell; *Lowe v. Grinnan*, 19 Ia. 193; *Iles v. Martin*, 69 Ind. 114; *Reeside v. Peter*, 35 Md. 221; but see *Foscue v. Lyon*, 55 Ala. 440. The trustee may convey to the cestui que trust, even though there is a provision in case of the latter's death, if authorized; *Sellew's App.* 36 Conn. 186. This power of sale may go with the legal estate, or be entirely independent of it; *Reid v. Gordon*, 35 Md. 184; *Prather v. McDowell*, 8 Bush, 46; *Tainter v. Clark*, 13 Met. 220; *White v. Howard*, 52 Barb. 294; *Peter v. Beverly*, 10 Pet. 532; *Jackson v. Burr*, 9 Johns. 104. Where the land descends to the heirs, the executors having a power to sell, it is a naked power, and until executed, the rents and profits belong to the heirs; *Braman v. Stiles*, 2 Pick. 460; *McKnight v. Wimer*, 38 Mo. 132; *Allen v. Demitt*, 3 Comst. 276; *Marsh v. Wheeler*, 2 Edw. Ch. 156; so too, if a trustee is the devisee. In the United States there are statutory provisions for the sale of real estate by those holding a fiduciary relation, and the heirs, devisees, or wards, hold until the sale takes place. 4 Kent, 321, n.

No particular form of words is required to establish a power of sale, if the intention appear, or if certain duties, necessitating a sale, are to be performed, it is sufficient; *Going v. Emery*, 16 Pick. 107; *Stockbridge v. Stockbridge*, 99 Mass. 244; *Savings Bank v. Ross*, 11 Allen, 443; *Williamson v.*

without the previous sanction of the Court (a); but where a suit has been instituted for the execution of the trust, *that*

(a) *Earl of Bath v. Earl of Bradford*, 2 Ves. 590, *per Lord Hardwicke*.

Suydam, 6 Wall. 723; *Stall v. Cincinnati*, 16 Ohio St. 169; *Rankin v. Rankin*, 38 Ill. 298; instructions to make a division are insufficient; *Mapes v. Tyler*, 43 Barb. 421; *Winston v. Jones*, 6 Ala. 550; *Moore v. Lockett*, 2 Bibb. 69. The successor of a trustee may exercise the power of sale; *Buchanan v. Hart*, 31 Tex. 647. An authority to sell does not include the right to mortgage; *Paine v. Barnes*, 100 Mass. 470; *Wood v. Goodridge*, 6 Cush. 117; *Ferry v. Laible*, 31 N.J. Eq. 567; *Stokes v. Payne*, 58 Miss. 614; *Hunt v. Townshend*, 31 Md. 338; *Tyson v. Latrobe*, 42 Md. 325; but see *Goehring's App.* 81½ Pa. St. 284; *Zane v. Kennedy*, 73 Pa. St. 183; but if trustee and cestui que trust are parties to it, they cannot invalidate it; *Ryder v. Sisson*, 7 R. I. 341. Where a trust is charged with debts, the trustee may have an option to sell or mortgage, the latter being favored; *Britton v. Lewis*, 8 Rich. Eq. 271; *Duval's App.* 38 Pa. St. 112; and a mortgage may be regarded as a conditional sale; *Leavitt v. Pell*, 25 N. Y. 474; a partial sale or a mortgage does not exhaust the power; *Asay v. Hoover*, 5 Barr, 21; if the court can provide for raising money it may decree a mortgage or a sale; *Williamson v. Field*, 2 Sandf. Ch. 533.

A power to sell does not include an exchange; *King v. Whiton*, 15 Wis. 684; *School v. McCully*, 11 Rich. 424; nor a partition; *Borel v. Rollins*, 30 Cal. 408; *Bradshaw v. Fane*, 3 Drew, 536; but power to "sell and exchange" authorizes partition; *Phelps v. Harris*, 51 Miss. 789; trustees may have power to have a partition, although they personally cannot make it; *Naglee's Est.* 52 Pa. St. 154; nor does a power include the right to convey to a cestui trust or a legatee; *Goode v. Comfort*, 39 Mo. 313; *Russell v. Russell*, 36 N. Y. 581; or to lease; *Hubbard v. Elmer*, 7 Wend. 446; but see *Treat v. Peck*, 5 Conn. 280; unless strong reasons could be shown by the trustees; *Blake v. Sanderson*, 1 Gray, 333; *Hedges v. Riker*, 5 Johns. Ch. 163; where the heirs hold until sale, they have power to reap the profits; *Seymour v. Bull*, 3 Day, 389. The trustees in selling must act for the best interest of the cestuis que trust; *Gould v. Chappelle*, 42 Md. 466; *Chesley v. Chesley*, 49 Mo. 540.

Trustees must give sufficient notice of the sale to bring about all reasonable competition, but no particular form of advertising is required; *Harper v. Hayes*, 2 Gif. 216; *Reese v. Peter*, 33 Md. 120; *Stephenson v. January*, 49 Mo. 465; *Newman v. Jackson*, 12 Wheat. 570; *Cushman v. Stone*, 69 Ill. 516; if notice must be given at a particular place, notice elsewhere is void; *Sears v. Livermore*, 17 Ia. 297; if in discretion of trustee, advertising may be dispensed with; *M'Dermut v. Lorillard*, 1 Edw. Ch. 273; any statutory requirements must be followed; *Campbell v. Tagge*, 30 Ia. 305; *Stine v. Wilkson*, 10 Mo. 75. Mere inadequacy of price is not sufficient cause for setting aside a sale; *Booker v. Anderson*, 35 Ill. 66; *Boehlert v. McBride*, 48 Mo. 505; *Carter v. Abshire*, 48 Mo. 300; *Waterman v. Spaulding*, 51 Ill. 425; *Clark v. Freedman's Savings Co.* 100 U. S. 149; see also *Carpenter v. Robinson*, 1 Holmes, 67; *Horsey v. Hough*, 38 Md. 130; *McNeil v. Gates*, 41 Ark. 264; *Morse v. Hill*, 136 Mass. 60; if there are two equally advantageous offers, the trustee may choose between them; *Selby v. Bowie*, 4 Gif. 300.

A trustee who takes no part in the sale is nevertheless responsible, for he cannot delegate his power; *Oliver v. Court*, 8 Price, 166; *Berger v. Duff*, 4

attracts the jurisdiction of the Court, and the trustees would not be justified in proceeding to a sale without the Court's

Johns. Ch. 368. It would be a breach of trust to insist upon a sale at an inopportune time; *Johnston v. Eason*, 3 Ired. Eq. 330; *Hunt v. Bass*, 2 Dev. Eq. 297; a trust to sell within a certain time does not invalidate a title given after that time has elapsed; *Smith v. Kinney*, 33 Tex. 283; unless time is of the essence of the power; *Booraem v. Wells*, 4 C. E. Green Ch. 87; in which case the trustee would be responsible for any loss incurred thereby; *Isham v. Delaware, &c., R. R. Co.* 3 Stock, 227; trustees may make no distinction between timber and minerals; *Cadwalader's App.* 64 Pa. St. 293; several parcels may be sold in one lot; *Kellogg v. Carrico*, 47 Mo. 157; *Quidnick Co. v. Chafee*, 18 R. I. 367; *Tatum v. Holliday*, 59 Mo. 422; *Benkendorf v. Vincenz*, 52 Mo. 441; or one parcel sold in several lots; *Miller v. Evans*, 35 Mo. 45; *Gillespie v. Smith*, 29 Ill. 472; *Sumrall v. Chaffin*, 48 Mo. 402; *Stall v. Macalester*, 9 Ohio, 19; the object in selling is ordinarily to make a better investment elsewhere; *Wormley v. Wormley*, 8 Wheat. 421; and the trustee must not be influenced by any personal or selfish motive.

A trustee cannot delegate the power; *Hawley v. James*, 5 Paige, 487; *Black v. Erwin*, Harp. L. 411; *Cushman v. Stone*, 69 Ill. 516; except as to mere ministerial matters; *Graham v. King*, 50 Mo. 22; *Howard v. Thornton*, 50 Mo. 291; *Bales v. Perry*, 51 Mo. 449; and the trustee should be present during the sale; *Brickenkamp v. Rees*, 69 Mo. 426; and also the property; *Hannah v. Carrington*, 18 Ark. 85. A sale though not for money may be valid; *Speigle v. Meredith*, 4 Biss. 120; and neglect to take security will not avoid it; *Yaryan v. Shriner*, 26 Ind. 364. A sale by an agent, except ministerially, is void; *Pearson v. Jamison*, 1 McLean, 197. Trustees should all join in the appointment of an agent; *Sinclair v. Jackson*, 8 Cow. 582; all deeds should be executed by them, not by attorney; *Cranston v. Crane*, 97 Mass. 459; *Hawley v. James*, 5 Paige, 487; the husband need not join in deed of wife, who is holder of the power; *Cranston v. Crane*, 97 Mass. 459. Trustees for creditors may convey by attorney; *Blight v. Schenck*, 10 Barr, 285; but the powers of those holding a fiduciary relation are regulated largely by local statutes.

A sale may be private if it seems more advantageous; *Jackson v. Williams*, 50 Ga. 553; *Crane v. Reeder*, 22 Mich. 339; *Ashurst v. Ashurst*, 13 Ala. 781; *Shacklett v. Ransom*, 54 Ga. 350; unless the power requires an action; *Greenleaf v. Queen*, 1 Pet. 145; but this requirement may be waived if it is for any reason impracticable; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Tyson v. Mickle*, 2 Gill, 383. A private sale may be without notice; *Minuse v. Cox*, 5 Johns. Ch. 441; a bid by letter at an auction is valid; *Tyree v. Williams*, 3 Bibb, 367. A bid made by mistake may be waived, even if the sale is for less; *Waterman v. Spaulding*, 51 Ill. 425; so a bid may be rejected, if deemed advisable; *Gray v. Veirs*, 33 Md. 18. An auction sale is most desirable, if *bonâ fide*; *Shine v. Hill*, 23 Ia. 264; while there is always some risk attending private sales; *Johnson v. Dorsey*, 7 Gill, 269; and they will be set aside on slight provocation; *Penny v. Cook*, 19 Ia. 538.

An advertised sale may be adjourned; *Richards v. Holmes*, 18 How. 143; *Bennett v. Brundage*, 8 Minn. 432; but see *Griffin v. Marine Co.* 52 Ill. 130; in case of failure to sell, the property must be readvertised, as a sale on the same day would be improper; *Judge v. Booge*, 47 Mo. 544; trustees must show that power was complied with; *Hahn v. Pindell*, 1 Bush, 538; *Gibson v.*

sanction (b). Private contracts, therefore, after the institution of a suit, can only be entered into by trustees subject to

(b) *Walker v. Smalwood, Amb. Culpepper v. Aston*, 2 Ch. Ca. 116, 676; and see *Raymond v. Webb, Lofft*, 223; and see further, *infra*. 66; *Drayson v. Pocock*, 4 Sim. 283;

Jones, 5 Leigh, 370. If proper notice was given an error in its recital in the deed will not vitiate it; *O'Neil v. Vanderburg*, 25 Ia. 104. A purchaser cannot avoid purchase by questioning the notice; *Cassell v. Ross*, 33 Ill. 244; *Greenleaf v. Queen*, 1 Pet. 145. A stranger may post the notices and conduct the sale if the trustee ratify his acts; *Johns v. Sergeant*, 45 Miss. 332; but a stranger cannot object to the sale; *Herbert v. Hanrick*, 16 Ala. 581; *Wightman v. Doe*, 24 Miss. 675; *Larco v. Casaneuava*, 30 Cal. 560; and the proceedings cannot be collaterally attacked; *Williams v. Munroe*, 67 N. C. 164; *Reid v. Mullins*, 48 Mo. 344. If the cestui que trust waives irregularities, no one else can object; *Schenck v. Ellingwood*, 3 Edw. Ch. 175; and there is always a presumption of correctness; *Marshall v. Stephens*, 8 Humph. 159.

A power of sale must be exercised exactly in accordance with its terms and conditions; *Alley v. Lawrence*, 12 Gray, 373; *Mills v. Traylor*, 30 Tex. 7; *Young v. Van Benthuyssen*, 30 Tex. 762; *Berrien v. Thomas*, 65 Ga. 61; *Barrett v. Bamber*, 81 Pa. St. 247; *James v. Cowing*, 17 Hun, 256; *Loring v. Salisbury Mills*, 125 Mass. 138; *Scott v. Sierra Lumber Co.* 67 Cal. 71; a sale on credit is bad, if cash was required; *Waterman v. Spaulding*, 51 Ill. 425; *Palmer v. Williams*, 24 Mich. 328; or for less than sum named; *Cadwell v. Brown*, 36 Ill. 103; *Drusadow v. Wilde*, 63 Pa. St. 170. A sale before the happening of specified events is bad; *Davis v. Howcott*, 1 Der. & Bat. Ch. 460; *Ervine's App.* 16 Pa. St. 256; *Loomis v. M'Clintock*, 10 Watts, 274; *Blacklow v. Laws*, 2 Hare, 40. A power to sell when income is insufficient for support cannot be exercised until then; *Minot v. Prescott*, 14 Mass. 495; a sale within a limited period by deed dated after is good; *Harlan v. Brown*, 2 Gill, 475. A trustee may, if allowed to exercise his discretion, not be disturbed, unless guilty of fraud; *Greer v. McBeth*, 12 Rich. Eq. 254; *Bunner v. Storm*, 1 Sandf. Ch. 357. A trustee may exercise his power so long as anything remains to be done; *Cresson v. Ferree*, 70 Pa. St. 446; afterwards the power terminates; *Ward v. Barrows*, 2 Ohio St. 241; *Sharpsteen v. Tillou*, 3 Cow. 651; and a court may for that cause forbid a sale; *Murdock v. Johnson*, 7 Coldw. 606.

Sometimes a power of sale will be exercised only in case of great urgency; *Goddard v. Brown*, 12 R. I. 31. The court may elect between a sale and an extension of time in which to redeem; *Johns v. Smith*, 56 Miss. 727. A sale on a general election day is not sufficient ground for avoiding it; *Bank of Commerce v. Lanahan*, 45 Md. 396. A sale with great loss requires that the need of the sacrifice should be shown; *Cocke v. Minor*, 25 Gratt. 246. A wrongful sale passes no title; *Welch v. Greenalge*, 2 Heisk. 209; *Mills v. Traylor*, 30 Tex. 7. If a sale is to be by consent of majority, the meaning is a majority of those living; *Sohier v. Williams*, 1 Curtis, 479; *Leeds v. Wakefield*, 10 Gray, 514. A power is defeated by death of one whose consent is required; *Alley v. Lawrence*, 12 Gray, 373; unless it be a person, practically a corporation sale; *Barber v. Cary*, 1 Kern. 397. If there is a power to sell if personal property is insufficient to pay debts, it must be proven; *Graham v. Little*, 5 Ired. Eq. 407; *Roseboom v. Mosher*, 2 Denio, 61, and trustees must

the approbation of the Court, and a condition is commonly annexed that the contract shall be null and void, unless the sanction of the Court be obtained within a limited period. Cases have occurred where, from accidental circumstances, the sanction has not been obtained within the time, and then by the death of the purchaser the contract has dropped to *the ground, and the representatives of [*423] the purchaser have not felt themselves justified in renewing it. The better mode would be to give *liberty* to the purchaser at any time after the expiration of the limited

sell, whether they approve or not; *Coleman v. M'Kinney*, 3 J. J. Marsh. 246. In case a sale takes place there is a presumption that all necessary conditions have been performed; *Wilson v. South Park Commissioners*, 70 Ill. 46; *Graham v. Fitts*, 53 Miss. 307; *Penniman v. Sanderson*, 13 Allen, 193; *Hamilton v. Crosby*, 32 Conn. 342. See distinctions between conditions precedent and subsequent; *Mason v. Martin*, 4 Md. 125; *Hill on Trustees*, 178. Trustees should covenant only against their own acts; *Barnard v. Duncan*, 38 Mo. 170. If a trade is thrown up and any of the consideration is forfeited, the trustee must account for it; *Campbell v. Johnston*, 1 Sandf. Ch. 143. A tenant for life may purchase; *Miltenberger v. Morrison*, 46 Mo. 251. The purchaser is not bound to see to the application of the purchase money; *Norman v. Towne*, 130 Mass. 52; *Wagner v. Blanchet*, 27 N. J. Eq. 356; *Conover v. Stothoff*, 38 N. J. Eq. 55; *Keister v. Scott*, 61 Md. 507; *John v. Barnes*, 21 W. Va. 498; but see *Jackson v. Davis*, *MacArthur & Mackey*, 334. Insolvency of the trustee is immaterial; *Tooke v. Newman*, 75 Ill. 215; *McGready v. Harris*, 54 Mo. 137.

The trustee advertised and sold whole land, but the purchaser only getting deed of part, the trustee could make a deed for the balance; *O'Day v. Vansant*, 3 Mackey, 196. Guardian sold less than he held, and then acquiring it for himself improved it, but lost all he had done; *Dickinson v. Durfee*, 139 Mass. 232.

Library association bought more land than it needed, and sold part; *Attorney-General v. Greenfield Library Association*, 135 Mass. 563. Court cannot decree sale of corpus of estate when one is trustee for life only; *Rogers v. Pace*, 75 Ga. 436.

The power given to an executor to sell, did not extend to an administrator with the will annexed; *Banting v. Gummerson*, 24 Q. B. 287; a power to sell does not include a power to mortgage; *Nowlan v. Logie*, 7 Chy. 88; *Henderson v. Woods*, 9 Chy. 539; *Edinburgh Life Ins. Co. v. Allen*, 18 Chy. 425; see also *Ewart v. Dryden*, 13 Chy. 50.

Courts will not set aside sales made by trustees merely because of inadequacy of price; *Linton v. Michie*, 7 Chy. 182; but if the trustee made no effort to get a higher price, and it is clear that he might have sold to better advantage, he may be held responsible for the loss; *Graham v. Yeomans*, 18 Chy. 238. If a trustee has discretion to sell or not, courts will not interfere, but leave him in free exercise of his privilege; *In re Parker*, 20 Chy. 389; *Coy v. Coy*, 25 Chy. 267. Devisees in trust for sale of real estate must jointly receive or unite in receipts for purchase money; *Ewart v. Snyder*, 13 Chy. 55; a power to sell residue of lands, is a general power as to them; *In re Evans*, 4 Chy. Chamb. 102.

period, but before any confirmation by the Court, to determine the contract.

2. **Must consult the interest of the cestui que trust.**—A trustee for sale will remember that he is bound by his office to sell the estate under every possible advantage to his *cestui que trust* (a), and in the case of several successive *cestuis que trust*, with a fair and impartial attention to the interests of all the parties concerned (b). If trustees, or those who act by their authority, fail in reasonable diligence in inviting competition (c), or in the management of the sale (as if they contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another), they will be personally responsible for the loss to the suffering party (d); and the Court, however correct the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement (e). But if a trustee has once contracted to sell *bond fide*, a court of equity will not allow the contract to be invalidated because another person comes forward and is willing to give a higher price (f); and where there are two offers equally advantageous, one of which is preferred by a *cestui que trust*, it is not the duty of the trustees against their own opinion to accept the offer preferred by such *cestui que trust* (g).

3. **Where sale is a breach of trust.**—In no case will the Court enforce the specific performance of a contract which amounts to a *breach of trust* (h).

(a) *Downes v. Grazebrook*, 3 Mer. 208, per Lord Eldon; and see *Matthie v. Edwards*, 2 Coll. 480.

(b) *Ord v. Noel*, 5 Mad. 440, per Sir J. Leach; and see *Anon. case*, 6 Mad. 11.

(c) *Ord v. Noel*, 5 Mad. 440, per Sir J. Leach; and see *Harper v. Hayes*, 2 Giff. 217.

(d) See *Pechel v. Fowler*, 2 Anst. 550.

(e) *Ord v. Noel*, 5 Mad. 440, per Sir J. Leach; *Turner v. Harvey*, Jac. 178, per Lord Eldon; *Bridger v. Rice*, 1 J. & W. 74; *Mortlock v. Buller*, 10 Ves. 292; and see *Hill v. Buckley*, 17

Ves. 394; *White v. Cuddon*, 8 Cl. & Fin. 766.

(f) *Harper v. Hayes*, 2 Giff. 210, reversed 2 De G. F. & J. 542.

(g) *Selby v. Bowie*, 4 Giff. 300.

(h) *Wood v. Richardson*, 4 Beav. 176, per Lord Langdale; *Fuller v. Knight*, 6 Beav. 205; *Thompson v. Blackstone*, 6 Beav. 470; *Sneesby v. Thorne*, 7 De G. M. & G. 399; *Muc-holland v. Belfast*, 9 Ir. Ch. Rep. 204; *Saunders v. Mackeson*, W. N. 1866, p. 400; [*Oceanic Steam Navigator Company v. Sutherland*, 16 Ch. D. 236; *Dunn v. Flood*, 25 Ch. D. 629; 28 Ch. Div. 586.]

4. *Cestuis que trust may contract conditionally.*—The usual course is said to be for the *cestuis que trust*, who are the persons most interested in the matter, and who have the strongest motives for obtaining the highest possible price, to enter into a conditional contract, and then to obtain the assent of the trustee, who, when he has satisfied himself that the sum proposed *is the value of the property, [*424] sanctions a sale which is beneficial to his *cestuis que trust* (a).

5. *Valuation of the property.*—A trustee for sale must inform himself of the real value of the property, and for that purpose, will, if necessary, employ some experienced person to furnish him with an estimate (b). If the property be sold at a grossly inadequate value, it is a breach of trust, which affects the title in the hands of the purchaser (c).

6. *Each trustee responsible for the sale.*—A trustee who takes no active part in the business cannot excuse himself by saying he had nothing to do with the conduct of the other to whom the management was confided; for where several trustees commit the entire administration of their trust to the hands of one, they are all equally responsible for the faithful discharge of their joint duty by that one whom they have substituted (d).

7. *What time allowed for disposing of the estate.*—The trustees will be allowed a reasonable time for disposing of an estate, and though the instrument creating the trust direct them to sell "*with all convenient speed*," that is no more than is implied by law, and does not render an immediate sale imperative (e). On the other hand, if the trust be to sell "at such time and in such manner as the trustee shall think fit," this will not authorise the trustees as between them and

(a) *Palairot v. Carew*, 32 Beav. 568.

(b) See *Oliver v. Court*, 8 Price, 165; *Campbell v. Walker*, 5 Ves. 680; *Conolly v. Parsons*, 3 Ves. 628, note; *Sugd. Vend. & Purch.* 55, 11th ed.

(c) *Stevens v. Austen*, 7 Jur. N. S. 873.

(d) *Oliver v. Court*, 8 Price, 166, per Lord Chief Baron Richards; *In*

re Chertsey Market, 6 Price, 285, per eundem.

(e) *Buxton v. Buxton*, 1 M. & Cr. 80; *Garrett v. Noble*, 6 Sim. 504; *Fry v. Fry*, 27 Beav. 144; and see *Fitzgerald v. Jervoise*, 5 Mad. 25; *Vickers v. Scott*, 3 M. & K. 500; *Sculthorpe v. Tipper*, 13 L. R. Eq. 232; *Turner v. Buck*, 18 L. R. Eq. 301.

their *cestuis que trust* to postpone the sale arbitrarily to an indefinite period. The trustees cannot by such postponement vary the relative rights of the tenant for life and remaindermen, and so interfere with the settlor's intention (*f*). If trustees for a length of time, as for twenty years, neglect without any sufficient reason to sell, they will be answerable for any depreciation, and be decreed to account for interest instead of rents (*g*).

8. **Trust to sell within a limited period.** — If the trust be "with all convenient speed and *within five years*," to sell the estate and apply the funds in payment of debts, &c., the proviso as to the five years is considered as directory only, and the trustees can sell and make a good title after the lapse of that period. The Court could scarcely impute to the settlor the intention that the sale at the end of [*425] the five years should be made * by the Court, which would be the case if the power in the trustees were extinguished (*a*).

[9. **Cestuis que trust all sui juris.** — A trust for sale is not put an end to by reason of all the persons beneficially interested becoming *sui juris*, for any one of the *cestuis que trust* has a right to insist on the trust being carried out, but if they all agree to take the property as realty, the trust for sale is extinguished (*b*).]

10. **Trustee for sale may not grant leases.** — In a case where the trustees had endeavoured for some time to sell, and not having succeeded, they agreed to execute a *lease*, the Court, on a bill filed by the trustees, to compel specific performance, refused to decree the lease, as the trust for sale did not *primâ facie* imply a power to grant leases (*c*). And so *executors* who are *quasi* trustees for sale, would, under special circumstances only, be justified in granting a lease (*d*); for

(*f*) See *Walker v. Shore*, 19 Ves. 391; *Hawkins v. Chappel*, 1 Atk. 623.

(*g*) *Fry v. Fry*, 27 Beav. 144; *Patenden v. Hobson*, 1 Eq. Rep. 28.

(*a*) *Pearce v. Gardner*, 10 Hare, 287; and see *Cuff v. Hall*, 1 Jur. N. S. 973; *De la Salle v. Moorat*, 11 L.

R. Eq. 8; [*Edwards v. Edmunds*, 34 L. T. N. S. 522.]

[(*b*) *Biggs v. Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315.]

(*c*) *Evans v. Jackson*, 8 Sim. 217.

(*d*) *Hackett v. M'Namara*, Ll. & G. Rep. t. Plunket, 283.

such an act is not regularly within their province, and it is incumbent on the persons taking a lease from them to show that it was called for by the interests of the parties entitled to the property (e).

[11. **May not give option to purchase.**—And executors and administrators equally with trustees cannot bind the trust estate by a proviso in a lease that the lessee shall during the term have an option of purchasing the property at a fixed price (f); for it is the duty of the trustees to exercise their discretion at the time of sale as to whether the terms are in the circumstances as then existing beneficial to the *cestuis que trust*. And on the same principle a covenant by a trustee in a lease to renew on the payment of a fixed fine was held to be a breach of trust and not enforceable by the lessee (g).]

12. **Trust for sale will not in general authorise a mortgage.**—A trust for sale, if there be nothing to negative the settlor's intention to convert the estate absolutely, will not authorise the trustees to execute a *mortgage* (h). But where an estate is devised to trustees, *charged with debts*, the subject thereto, upon trust for certain parties, so that a sale, though it may be required, is not the testator's object, the trustees may, for the purpose of paying the debts, more properly mortgage than sell (i). "A power of sale out * and out," observed Lord St. Leonards, "for a pur- [*426] pose or with an object beyond the raising of a particular charge, does not authorise a mortgage: but where it is for raising a particular charge, and the estate is settled subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money" (a).

(e) *Keating v. Keating*, L.L. & G. Rep. t. Sugden, 133; [*Oceanic Steam Navigation Company v. Sutherland*, 16 Ch. D. 236.]

[(f) *Oceanic Steam Navigation Company v. Sutherland*, 16 Ch. D. 236; *Clay v. Rufford*, 5 De G. & Sm. 768.]

[(g) *Bellringer v. Blagrove*, 1 De G. & Sm. 63.]

(h) *Haldenby v. Spofforth*, 1 Beav. 390; *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Page v. Cooper*, 16 Beav. 396; *Devaynes v. Robinson*, 24 Beav. 86.

(i) *Ball v. Harris*, 4 M. & Cr. 264.

(a) *Stroughill v. Anstey*, 1 De G.

13. Where the power is left to the discretion of the trustees the purchaser cannot question the exercise of the discretion.— A testator devised an estate to trustees upon trust to apply the rents for fifteen years in payment of incumbrances charged thereon, and if, for any reason whatever, in the *opinion of the trustees* a sale should become necessary, “they were authorised to sell.” The purchaser objected that the amount of the incumbrances would not justify a sale of the whole estate, but it was held that the power of sale depended on the opinion of the trustees, and the fact that they thought it necessary would be evidenced by the conveyance (b).

14. A trust to mortgage will not authorise a sale.— A trust to raise money by *mortgage* will not authorise a sale, though the latter may be more beneficial to the estate; and the Court itself has no jurisdiction to substitute a sale for a mortgage (c).

15. Powers of sale.— It was held by V. C. Kindersley, that in the absence of any special direction a mere power to *mortgage* does not authorise a mortgage *with a power of sale*, since how can a trustee who has not in himself even any power to sell give authority to another to sell (d). But according to V. C. Malins a direction to trustees to raise money “by mortgage *in such manner as they may think fit*,” authorises a mortgage with a power of sale (e), and according to Lord Romilly, M. R., a power to raise money by *sale or mortgage* justifies a mortgage with a power of sale (f). There is no doubt a conflict of authority. If a mortgage *per se* does not imply a power of sale, a direction to sell or mortgage will not carry the matter further, for the trustee has no power to delegate his authority to sell, and if the broad general principle be adopted that the power of sale is an ordinary incident to the mortgage, the logical result would

M. & G. 645; Page v. Cooper, 16 Beav. 400.

(b) Rendlesham v. Meux, 14 Sim. 249.

(c) Drake v. Whitmore, 5 De G. & Sm. 619.

(d) Clarke v. Royal Panopticon, 4 Drew. 26; but see Russell v. Plaice,

18 Beav. 21; Leigh v. Lloyd, 2 De G. J. & S. 330; 35 Beav. 455; *Re Chawner's Will*, 8 L. R. Eq. 569.

(e) *Re Chawner's Will*, 8 L. R. Eq. 569.

(f) Bridges v. Longman, 24 Beav. 27; and see Cook v. Dawson, 29 Beav. 128.

be that a power of mortgaging alone authorises a mortgage with a power of sale. Of course where the *Court* has jurisdiction to raise money * out of an estate, as [*427] for payment of debts, it may either direct a sale, or a mortgage with a power of sale (*a*), and an executor is, for the purposes of paying debts, regarded as the absolute owner, and may therefore either sell or mortgage or give a mortgage with a power of sale (*b*). [Since the Conveyancing and Law of Property Act, 1881, under which mortgagees, where the mortgage is made by deed, have by virtue of the Act a power of sale vested in them, the point has become practically unimportant; but it is conceived that, as by the 66th section of the Act, a power of sale in the form contained in the Act is in effect declared to be a proper power to be contained in a mortgage deed, it cannot be contended that a power to mortgage does not now authorise the insertion of a power of sale in the mortgage deed.]

16. **Sale of equity of redemption.**—If an equity of redemption be vested in trustees for sale with a direction to apply the proceeds in discharge of the *mortgage* and pay the balance to the settlor, the trustees, notwithstanding the direction to discharge the mortgage, may *sell subject to it* (*c*).

17. **A power of sale will not authorise a partition.**—A power to trustees to *sell* will not authorise a *partition*, and it was long considered doubtful whether a power to *sell and exchange* would do so (*d*), [but it has recently been decided that under the usual power of sale or exchange a partition can be effected (*e*), and this decision is not likely to be disturbed.

18. **Effect of usual power of sale in settlements.**—Prior to the Settled Land Act, 1882,] in *settlements* of real estates a *power of sale* was usually given to trustees, to be exercised

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| (a) <i>Selby v. Cooling</i> , 23 Beav. 418. | 1 Madd. 214]; <i>Brassey v. Chalmers</i> , |
| (b) <i>Cruikshank v. Duffin</i> , 13 L. R. | 16 Beav. 223; 4 De G. M. & G. 528; |
| Eq. 555; and see <i>Earl Vane v. Rig-</i> | <i>Bradshaw v. Fane</i> , 2 Jur. N. S. 247; |
| <i>den</i> , 5 L. R. Ch. App. 663. | 3 Drew. 534. |
| (c) <i>Manser v. Dix</i> , 8 De G. M. & | (e) [<i>In re Frith and Osborne</i> , 3 |
| G. 703. | Ch. D. 618, and see <i>Doe v. Spencer</i> , 2 |
| (d) [<i>M'Queen v. Farquhar</i> , 11 Ves. | Exch. 752; <i>Abel v. Heathcote</i> , 4 Bro. |
| 467; <i>Attorney-General v. Hamilton</i> , | C. C. 278; 2 Ves. 98. |

with the consent of the tenant for life, with a direction to lay out the proceeds, with all convenient speed, in another purchase, and in the meantime to invest them upon some proper security. For determining upon what occasions the trustees would be justified in proceeding to a sale, it will be proper to notice, in the words of Lord Eldon, the intention of the settlement in so framing the power:—“The object of the sale,” he said, “must be to invest the money in the purchase of another estate, to be settled to the same uses, and the trustees are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or, at least, this Court would expect some strong purpose of family prudence justifying [*428] the conversion, if it is likely to *continue money” (a).

Sir W. Grant is said to have concurred in the same sentiments (b), so that clearly the trustees as between them and their *cestuis que trust* would not be justified in selling to gratify the caprice or promote the exclusive interest of the tenant for life. It might happen that particular circumstances might call for an immediate sale, as where an extremely advantageous offer is made, or there is a prospect of great deterioration by abstaining from exercising the power; but, generally speaking, the trustees ought not to convert the estate without having another purchase in view, and then not for the mere purpose of conversion, but in the honest exercise of their discretion, for the benefit of all parties claiming under the settlement (c). The power of investing the proceeds upon some security in the meantime was not meant to authorise the *continuance* of the property as *money*, but only to meet the exigencies of particular circumstances, as where the trustees are disappointed of the contemplated new purchase, or the state of the title to the new purchase leads to necessary delay.

19. **Effect of the Drainage Acts.**—It is also to be noticed where the lands have been charged by the tenant for life

(a) *Mortlock v. Buller*, 10 Ves. 308, 309.

(b) *Lord Mahon v. Earl of Stanhope*, cited 2 Sug. Pow. 412.

(c) See *Cowgill v. Lord Oxmantown*, 3 Y. & C. 369; *Watts v. Girdlestone*, 6 Beav. 188; *Marshall v. Sladden*, 4 De G. & Sm. 468; [*Jaques v. Wilson*, W. N. 1880, p. 83.]

under the *Drainage Acts*, that as the sale can only be made subject to the charge, the exercise of the power will confer a benefit on the tenant for life, for *before* the sale he is bound by the Acts to pay not only the interest on the charge, but also part of the principal, but *after* the sale he becomes under the settlement tenant for life of the whole proceeds.

[20. **At the request and by the direction of tenant for life.** — Where the power of sale was given to the trustees “at the request and by the direction of” the tenant for life, the Court refused to restrain a sale although no immediate reinvestment was contemplated, being of opinion that the tenant for life had a right to call upon the trustees to sell, and that they had no right to refuse his request (*d*).

21. **Settled Land Act.** — Under the Settled Land Act, 1882, the power of sale is given to the tenant for life, and may be exercised by him without reference to any prospective reinvestment of the purchase-money in the purchase of another estate. In fact there is no restriction whatever in the Act on his power of sale, which, subject to the giving of certain notices (*e*), may be exercised by him, on any grounds which he thinks sufficient, without any liability on his part, to justify *the grounds, and without any [*429] power in the trustees of the settlement or in the Court to interfere with his power of sale so long as the same is honestly and properly exercised (*a*). It must however be borne in mind that the tenant for life is under the 53d section “in relation to the exercise of any power under the Act, to be deemed in the position and to have the duties and liabilities of a trustee for all parties entitled under the settlement,” and it is conceived that the effect of this is to put the tenant for life in the position of a trustee with a power of sale exercisable in all respects at his absolute discretion, and to make the exercise of the power subject to the control of the Court in all cases in which the tenant for life is influenced by dishonest or improper motives (*b*).

[(*d*) *Thomas v. Williams*, 24 Ch. D. 558.]

[(*a*) *Wheelwright v. Walker*, 28 Ch. D. 752.]

[(*e*) 45 & 46 Vict. c. 38, s. 45; 47 & 48 Vict. c. 18, s. 5.]

[(*b*) As to the control of the Court over the exercise of powers, see *post*,

22. The result of the late Act is that it is now unnecessary and undesirable to insert a power of sale in a family settlement of real estate; but the powers arising under the Act which are sufficient for any ordinary case should be relied on (c).

23. **Sale with consent.**—Where trustees were empowered to sell and enfranchise with the consent of the person for the time being entitled as beneficial tenant for life, and the will contained a direction that no repurchase or reinvestment should be made while there should be any person entitled as beneficial tenant for life or tenant in tail in possession and of the age of twenty-one years, without the previous consent of such person, it was held that the trustees could during the infancy of a tenant in tail in possession make a good title under the power (d).]

24. **Sale at request of a party.**—Trustees for sale at the request and by the direction of another party, to be testified in writing, &c., cannot obtain a decree for specific performance without first proving that the contract was entered into at such request and by such direction, and that such request and direction have, either before or since the contract, been testified by the requisite writing (e). Nor if trustees have a power of selling or leasing at the written request of another, will the Court enforce a contract without such request, though it is alleged that there was part performance [*430] by the trustees and by the person * whose request was necessary, and that it is therefore a case where a mere *parol* contract is sufficient (a).

25. **Trustees for sale of a limited interest in an estate or of an aliquot part of an estate.**—If an estate be vested in trustees upon trust for A. for life, and on the decease of A. to

chap. xxiii. s. 2. See also the observations in *Wheelwright v. Walker*, 23 Ch. D. 759, which seem not to give full effect to sect. 53 of the Settled Land Act, 1882.]

[(c) As to the powers of a tenant for life under the Act, and the effect of the Act generally, see *post*, chap. xxii.]

[(d) *Re* Sir T. Neave and Chap-

man and Wren, 49 L. J. N. S. Ch. 642.]

(e) *Adams v. Broke*, 1 Y. & C. C. C. 627; *Sykes v. Sheard*, 33 Beav. 114; see the decree at the foot of the case; and see *Blackwood v. Borrowes*, 2 Conn. & Laws. 459.

(a) *Phillips v. Edwards*, 33 Beav. 440.

sell, the trustees have no power to sell during the life of A., however beneficial it may be to the parties interested in the trust (*b*). But if an estate be devised to A. for life, and after her decease to trustees upon trust to sell "as soon as conveniently may be after the *testator's* decease," the trustees, with the concurrence of A., can make a good title (*c*); and if the tenant for life and the trustees in remainder sell for one entire sum, it has been held that the purchaser will get a good title, and the tenant for life and the trustees may agree as amongst themselves how the purchase money is to be apportioned, or if they cannot agree it will be apportioned by the Court (*d*); [and the same principle was applied where the trustees of a reversion expectant on a lease concurred with the owner of the lease in selling the fee (*e*).] And generally trustees for sale of any aliquot part of an estate may join in a sale of the whole estate for one entire sum, and the purchase money, as amongst the respective owners, may be left to be apportioned as before (*f*); and where a testator's estate was under administration by the Court, and a house, part of that estate, was put up for sale with another house which was comprised in the testator's marriage settlement, in one lot, and the trustees of the settlement had leave to attend, it was held that as the sale of the entirety was beneficial, a good title could be made, and that the purchase-money could be apportioned in chambers (*g*). But a purchaser cannot be compelled to accept such a title if the separate interests of the *cestuis que trust* in such a joint sale be not brought to the sale with every advantage, or if the nature of the case be such that the purchase-money will not admit of apportionment upon any intelligible principle (*h*).

(*b*) *Johnstone v. Baber*, 8 Beav. 233; *Blacklow v. Laws*, 2 Hare, 40; *Mosley v. Hide*, 17 Q. B. 91; *Want v. Stallibrass*, 8 L. R. Ex. 175.

(*c*) *Mills v. Dugmore*, 30 Beav. 104.

(*d*) *Clark v. Seymour*, 7 Sim 67; [and see *Re Cooper and Allen's Contract*, 4 Ch. D. 802.]

[(*e*) *Morris v. Debenham*, 2 Ch. D. 540.]

(*f*) See *M'Carogher v. Whieldon*, 34 Beav. 107.

(*g*) *Cavendish v. Cavendish*, 10 L. R. Ch. App. 319 [As to the power of trustees to grant a lease of two estates held upon different trusts, see *Tolson v. Sheard*, 5 Ch. D. 19.]

(*h*) *Rede v. Oakes*, 32 Beav. 555; 10 Jur. N. S. 1246; [4 De G. J. & S. 505; see *Re Cooper and Allen's Contract*, 4 Ch. D. 802.]

26. *Trust for sale survives.*— Where an estate is vested in several trustees upon trust to raise a sum by sale or mortgage, and one of the trustees dies, the survivors or survivor may sell or mortgage, unless there be words in [*431] *the settlement which expressly declare that the trust shall not be exercised by the *survivors or survivor*, for the execution of a trust is not regarded in the same light as that of a power; but the presumption is that, as the estate, so the discretionary part of the trust passes to the survivors or survivor (*a*).

Though there be a power to appoint new trustees.— The objection is sometimes taken that where there is a power of appointment of new trustees, and one of the trustees has died and a new trustee has not been substituted, the survivor is incompetent to execute a valid conveyance. But though a proviso for appointment of new trustees may certainly be so framed that the execution of the trust should, until a new trustee has been substituted, remain in suspense (*b*), yet the clause, as usually penned in settlements [and as framed in the Conveyancing and Law of Property Act, 1881, s. 31,] is considered by the Courts to be merely of a directory character (*c*).

27. *Power of sale in a mortgage.*— In a *mortgage* to two persons to secure a *joint* advance with a *power of sale* to “them, their heirs and assigns,” if one dies, the survivor may sell (*d*); and in a mortgage to A. in fee, with a power of sale to him, “his heirs, executors, administrators or assigns,” the administrator of the assign of A., though the legal estate of the lands be not in himself, but in a trustee for him under a conveyance from the heir of the assign, is, together with such trustee, an assign within the meaning of the power, and can therefore sell (*e*). And it does not vitiate the sale, that part of the purchase-money is left on mortgage of the estate, but the mortgagee is answerable for the whole amount to the mortgagor (*f*).

(a) *Lane v. Debenham*, 11 Hare, 188.

(d) *Hind v. Poole*, 1 K. & J. 383.

(e) *Saloway v. Strawbridge*, 1 K.

(b) See *Foley v. Wontner*, 2 J. & W. 246.

& J. 371; 7 De G. M. & G. 594.

(c) See *supra*, pp. 262, 263.

(f) *Davey v. Durrant*, 1 De G. & J. 535; [*Bettyes v. Maynard*, 49 L.

28. 23 & 24 Vict. c. 145. — By 23 & 24 Vict. c. 145, as to mortgages *by deed* created since 28th August, 1860, and where the security does not speak to the contrary, any mortgagee, though his security contain no power of sale, may, when the principal sum has been in arrear for twelve months, or the interest for six months, or there has been any default by the mortgagor in insuring, proceed to a sale, after six months' notice, and sign a valid receipt for the purchase-money (*g*).

[44 & 45 Vict. c. 41. — But this has been repealed as to instruments executed after the 31st of December, 1881, and its place supplied as to such instruments by the Conveyancing and Law of Property Act, 1881, which gives to *mortgagees of property generally, whether real or [*432] personal, where the mortgage is by deed, and no contrary intention is expressed in the instrument, power to sell the mortgaged property when the mortgage money has become due; but the power is not to be exercised unless and until —

(1). Notice requiring payment of the mortgage money has been given, the default made in payment for three months; or

(2). Some interest has been in arrear for two months after becoming due; or

(3). There has been a breach on the part of the mortgagor of some provision contained in the mortgage deed or in the Act other than and besides a covenant for payment of the mortgage money or interest thereon (*a*).]

29. Trustees must show a good title. — As a trustee, like any ordinary vendor, is bound to make the purchaser a good title (*b*), it would be prudent before proceeding to the execution of the trust, to take the opinion of counsel whether a good title can be deduced. Should the contract for sale be unconditional and the title prove bad, the purchaser in a

T. N. S. 389; reversing S. C. 46 L. T. N. S. 766.]

(*g*) 23 & 24 Vict. c. 145, ss. 11-16; and s. 34.

[(*a*) 44 & 45 Vict. c. 41, ss. 19, 20, 71.]

(*b*) *White v. Foljambe*, 11 Ves. 343, 345, *per* Lord Eldon; and see *M'Donald v. Hanson*, 12 Ves. 277.

suit for specific performance would have his costs against the trustee (c), though the trustee, where his conduct was excusable, might charge them upon the trust estate under the head of expenses.

30. *Timber*.—If trustees have a *power of sale only*, they cannot sell the estate separate from the *timber* standing upon it, though the tenant for life be without impeachment of waste, and might have cut the timber previously to the sale; and a sale so affected is absolutely void (d), unless it be effected subsequently to 18th August, 1859, when it may be confirmed by means of a legislative enactment in that behalf (e).

31. *Minerals*.—It is conceived that no distinction exists between timber and *minerals*, for both until severed form an integral part of the property. And it was accordingly, before the late Act, decided that the surface could not be sold apart from the minerals (f).

[*433] *25 & 26 Vict. c. 108.—But now, by 25 & 26 Vict. c. 108, trustees and other persons (a) are authorised, with the previous *sanction of the Court of Chancery*, to be obtained on petition in a summary way (b), to sell the *surface*

(c) *Edwards v. Harvey*, G. Coop. 40.

(d) *Cholmeley v. Paxton*, 3 Bing. 207; 5 Bing. 48; S. C. *nom.* *Cockerell v. Cholmeley*, 10 B. & C. 654; 3 Russ. 565; 1 R. & M. 418; 1 Cl. & Fin. 60.

(e) 22 & 23 Vict. c. 35, s. 13. [As to the power of a tenant for life impeachable for waste with the consent of the trustees of the settlement to cut and sell timber under the Settled Land Act, 1882, see sect. 35 of that Act.]

(f) *Buckley v. Howell*, 29 Beav. 546; as to sales under the Settled Estates Act, see *Re Mallins*, 3 Giff. 126; [*Re Milward's Estate*, 6 L. R. Eq. 248.] In settling lands where there are minerals, it may be convenient to enable the trustees for sale "as to any of the premises under which minerals may lie, to sell the surface apart from the minerals, or

to sell the minerals together with, or apart from, the surface, and to grant or reserve such rights of way as in-stroke or out-stroke, and any other easements in, upon, over, or under any of the said premises as may be necessary or desirable for the winning, working, storing, selling, and carrying away of any such minerals."

(a) And "other persons" has been held to comprise mortgagees; *Re Beaumont's Mortgage Trusts*, 12 L. R. Eq. 86; *Re Wilkinson's Mortgaged Estates*, 13 L. R. Eq. 634.

(b) Where the power of sale is in the trustees, with the consent of the tenant for life, a petition by the trustees must be served on the tenant for life, but not on the remainderman, *Re Pryse's Estate*, 10 L. R. Eq. 631; [*Re Nagle's Trusts*, 6 Ch. D. 104;] and the sanction of the Court being required for the protection of the

separate from the *minerals*, and the *minerals* separate from the *surface*, and such sales for the time past, where they have not been the subject of litigation, either concluded or pending, are confirmed.

[32. In the case of a sale by the tenant for life under the Settled Land Act, 1882, the sale may be made either of land with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any other land (*c*). During the minority of the tenant for life, or person having the powers of a tenant for life, this power may be exercised by the persons who are trustees of the settlement for the purposes of the Act, if any, and if there are none then by such persons as the Court may direct (*d*).]

33. **Where the estate is settled the timber cannot be sold separately.**—If lands be devised to trustees in trust to sell for payment of debts, and, subject to that charge, are given to A. for life *without impeachment of waste*, with remainders over, the trustees must not raise the money by a sale of timber, which would be a hardship on the tenant for life, but by a sale of part of the estate itself; and should they have improperly resorted to a fall of timber, the tenant for life would have a charge upon the lands to the amount of the proceeds (*e*).

34. **Implied reconversion.**—If a fund be subject to the ordinary trusts of a marriage settlement, with a power of varying securities and of selling out *any part [*434] thereof and investing the proceeds on a *purchase of a freehold estate* to be held “upon such trusts as will best and nearest correspond with the trusts thereinbefore declared”

beneficiaries, they must be served;
Re Brown's Trust Estate, 9 Jur. N. S.
 349; *Re Palmer's Will*, 13 L. R. Eq.
 406.

[(*d*) 45 & 46 Vict. c. 38, s. 60; and
 see *Re Duke of Newcastle's Estates*,
 24 Ch. D. 129.]

(*e*) *Davies v. Wescombe*, 2 Sim.

[(*c*) 45 & 46 Vict. c. 38, s. 17.]

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of the securities sold out (being trusts for the benefit of the parents and issue), and with a direction that the purchase to be so made shall be "deemed *personal estate* for all the purposes of the settlement and go accordingly," but *without a general receipt clause*, a trust for *reconversion* is implied, and the trustees can sell and sign a valid receipt (a).

[Trustees of personal estate whose trust authorises them to call in the trust property and invest the proceeds and vary the investments have an implied power of sale over real estate covenanted to be settled upon similar trusts (b).]

35. **Sale may be by private contract or by auction.**—The sale may be conducted by *public auction* or *private contract*, as the one or the other mode may be most advantageous, according to the circumstances of the case (c), and of course it is not an essential preliminary to a sale by private contract that the trustees should have previously attempted a sale by auction or even have inserted a public advertisement that the property was for sale (d). And it was held under the old Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 20, directing a sale by *auction*, that the assignees of the insolvent might sell a real estate by *private contract*, after an ineffectual attempt to dispose of it by auction (e). And, again, though the subsequent Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 47, directed the assignees of insolvents to sell "in such manner" as the major part, in value, of the creditors should direct, yet in a case where the creditors resolved that there should be a reserved bidding of 325*l.*, and the assignees sold by auction for 310*l.*, it was held that the clause was merely *directory*, and that the deviation from the resolution of the creditors did not, therefore, vitiate the sale (f).

(a) *Tait v. Lathbury*, 35 Beav. 112; and see *Master v. De Croismar*, 11 Beav. 184.

(b) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.]

(c) See *Ex parte Dunman*, 2 Rose, 66; *Ex parte Hurly*, 2 D. & C. 631; *Ex parte Ladbroke*, 1 Mont. & A. 384; *Davey v. Durrant*, 1 De G. & J. 535. As to trusts created since 28th Aug. 1860, the legislature has now

enacted to this effect, unless the settlement direct to the contrary; 23 & 24 Vict. c. 145, s. 1; [(repealed by 45 & 46 Vict. c. 38, s. 64, as to which see *post*, p. 436, note (a)); 44 & 45 Vict. c. 41, s. 35.]

(d) See *Davey v. Durrant*, 1 De G. & J. 535; and see *Harper v. Hayes*, 2 Giff. 210; 2 De G. & J. 542.

(e) *Mather v. Priestman*, 9 Sim. 352.

(f) *Wright v. Maunder*, 4 Beav.

36. **Sale must not be delegated.**—The trustee cannot without responsibility *delegate* the trust for sale (*g*); but there seems to be no objection to the employment * of agents by him, where such a course is conform- [*435] able to the common usage of business, and the trustee acts as prudently for the *cestuis que trust* as he would have done for himself (*a*). But an agent for sale must not be allowed to receive the purchase-money; [and an agent should not be employed to do anything out of the ordinary scope of his business; and it has even been held that the trustee's solicitor ought not to choose the valuer, as the choice is a matter on which the discretion of the trustee should be exercised (*b*).]

37. **If the sale be by auction, proper advertisements must be given.**—If the trustee think a sale by *auction* the more eligible mode, he must see that all proper advertisements are made, and due notice given. It was ruled in an old case (*c*) that a *cestui que trust* could not, by alleging the want of these preliminary steps, obtain an injunction against the sale; for the trustee being personally responsible to the *cestui que trust* for any consequential damage, the Court, it was said, could not regard it as a case of irreparable injury. But in more recent cases an injunction has been granted, it being the clear duty of the trustee to procure for the *cestuis que trust* the most advantageous sale (*d*).

[38. **Prior charges.**—By the Conveyancing and Law of Property Act, 1881, as to trusts or powers created since 31st December, 1881, and unless the settlement otherwise directs, a trustee may sell, or concur in selling, all or any part of the property either subject to prior charges or not (*e*).]

512; and see *Sidebotham v. Barrington*, 4 Beav. 110.

(*g*) *Hardwick v. Mynd*, 1 Anst. 109.

(*a*) *Ex parte Belchier*, Amb. 218; [*Re Speight*, 22 Ch. D. 727; 9 App. Cas. 1;] and see *Ord v. Noel*, 5 Mad. 438; *Rossiter v. Trafalgar Life Assurance Association*, 27 Beav. 377.

[(*b*) *Fry v. Tapson*, 28 Ch. D. 268.]

(*c*) *Pechel v. Fowler*, 2 Anst. 549.

(*d*) *Anon. Case*, 6 Mad. 10; *Blennerhasset v. Day*, 2 B. & B. 133. As to restraining a mortgagee from selling, see *Matthie v. Edwards*, 2 Coll. 465; S. C. on appeal *nomine Jones v. Matthie*, 11 Jur. 504; *Jenkins v. Jones*, 2 Giff. 99.

[(*e*) 44 & 45 Vict. c. 41, s. 35.]

39. **Conditions of sale.** — A trustee may sell subject to any reasonable *conditions of sale* (*f*), but would not be justified in clogging the property with restrictions that were evidently uncalled for by the state of the title (*g*). [Prior to the recent enactments it was] usual, in penning a trust for sale, to give express authority to the trustees to insert *special conditions of sale*; [but] as to trusts created after 28th August, 1860, and where the settlement did not otherwise direct, trustees [were authorised by Lord Cranworth's] Act to insert such *special or other stipulations*, either as to title or evidence of title or otherwise, as they might think [*436] fit (*h*). [This enactment has since *been repealed (*a*), but its place had been previously supplied by the Conveyancing and Law of Property Act, 1881, s. 35, which provides that, as to trusts for sale and powers of sale created by instruments coming into operation after the 31st day of December, 1881, trustees may, unless the instrument creating the trust or power otherwise provides, sell or concur with any other persons in selling, subject to any such conditions respecting title and evidence of title or other matter, as they think fit (*b*).] But still this would be no warrant for the introduction of stipulations which are plainly not rendered necessary by the state of the title, and are calculated to damp the success of the sale; [as, for instance, a condition limiting the commencement of the title to a recent date where there is no difficulty in giving the earlier title and no special advantage in withholding it, or a condition making all recitals in the abstracted documents conclusive evidence of the matters recited, or a condition that the property is sold subject to the existing tenancies, restrictive covenants, and other incidents of tenure (if any) when there are

(*f*) *Hobson v. Bell*, 2 Beav. 17.

(*g*) *Wilkins v. Fry*, 2 Rose, 375; S. C. 1 Mer. 208; *Rede v. Oakes*, 4 De G. J. & S. 505, 10 Jur. N. S. 1246; *Dance v. Goldingham*, 8 L. R. Ch. App. 902; [*Dunn v. Flood*, 25 Ch. D. 629; 28 Ch. Div. 586.]

(*h*) 23 & 24 Vict. c. 145, s. 2.

[(*a*) 45 & 46 Vict. c. 38, s. 64. The repeal is not to affect the operation,

effect, or consequence of any instrument executed or made before the commencement of the Act. The section of Lord Cranworth's Act may therefore be called in aid in cases of settlements executed after 28th Aug. 1860, and prior to the Conveyancing and Law of Property Act, 1881.]

[(*b*) 44 & 45 Vict. c. 41, s. 35.]

no such tenancies or covenants (*c*), but a condition limiting the title to ten years in a case where the land was broken up into small lots, and the condition was inserted for the purpose of saving expense, was held by the Court of Appeal, overruling North, J., to be reasonable and proper under the special circumstances (*d*). And] trustees would, it is conceived, be justified in inserting a condition, now not uncommon, empowering the vendor, if unable, or unwilling, for *reasonable cause*, to remove the purchaser's objection, to cancel the contract. Such a condition may be depreciatory at the sale itself, and yet beneficial in its results (*e*).

[40. If trustees have agreed to sell property subject to conditions of such a nature that the sale could be impeached by the *cestuis que trust*, the Court will not, at the instance of the trustees, enforce the contract against the purchaser (*f*).

41. As a tenant for life selling under the powers of the Settled Land Act, 1882, is by sect. 53, in relation to the exercise of the power to have the duties and liabilities of a trustee, it is conceived * that the same rules [*437] with regard to depreciatory conditions apply to him as to any other trustee.]

42. **Selling in lots.** — There is no rule to prevent the trustees from selling in *lots*, should the auctioneer or other experienced person recommend it as the most advisable course (*a*), and this liberty is now given by express enactment as to trusts created since 28th August, 1860, where the settlement does not direct the contrary (*b*).

[43. **Cheque for deposit.** — A trustee or mortgagee is justified, on the sale of a property of large value, in allowing the custom of auctioneers to accept a cheque in lieu of cash for

[(*c*) *Dunn v. Flood*, 25 Ch. D. 629; 28 Ch. Div. 586.]

[(*d*) *Dunn v. Flood*, 28 Ch. Div. 586.]

(*e*) *Falkner v. Equitable Reversionary Society*, 4 Drew. 352.

[(*f*) *Dunn v. Flood*, 25 Ch. D. 629; 28 Ch. Div. 586.]

(*a*) See Co. Lit. 113a; *Ord v. Noel*,

5 Mad. 438; *Ex parte Lewis*, 1 Gl. & J. 69.

(*b*) 23 & 24 Vict. c. 145, s. 1. [Repealed by 45 & 46 Vict. c. 38, s. 64; a similar power having been previously given to trustees under instruments coming into operation after 31st December, 1881, by 44 & 45 Vict. c. 41, s. 35. As to the effect of the repealing clause, see p. 436, note (*a*).]

the deposit to be acted upon, and will not be held guilty of negligence if the cheque be dishonoured (c).]

44. *Buying in.*—*Trustees of bankrupts cannot buy in* at the auction without the authority of the creditors, and where the assignees had put up the estate in two lots, and bought them in, and afterwards upon a re-sale there was a gain upon one lot and a loss upon the other, the balance upon the whole being in favour of the estate, Lord Eldon compelled the assignees to account for the diminution of price on the one lot, and would not allow them to set off the increase of price on the other lot (d).

It may be thought perhaps that as trustees in bankruptcy act under a statute they have less discretionary power than belongs to ordinary trustees; but in *Taylor v. Tabrum* (e) the same principle was applied to trustees in the proper sense of the word.

By 23 & 24 Vict. c. 145, as to trusts created [after 28th August, 1860, and prior to the repeal of the Act,] and where the settlement does not otherwise direct, trustees may sell at one time or at several times, and may *buy in*, or *rescind a private contract*, and resell without being responsible (f).

[By a later Act as to trusts or powers created since 31st December, 1881, where the settlement does not otherwise direct, trustees may “vary any contract for sale,” and may “buy in at any auction or rescind any contract for sale and resell without being answerable for any loss” (g).]

[*438] *45. 37 & 38 Vict. c. 78.—By the Vendor and Purchaser Act, 1874 (a), it is enacted, by the *first* section, that as to any contract “made *after 31st December*, 1874, and subject to any stipulation to the contrary, *forty years* shall be substituted as the period of commencement of title which a purchaser may require in place of *sixty years*,

[(c) *Farrer v. Lacy Hartland & Co.*, 25 Ch. D. 636.]

(d) *Ex parte Lewis*, 1 Gl. & J. 69; and see *Ex parte Buxton*, Id. 355; *Ex parte Baldock*, 2 D. & C. 60; *Ex parte Gover*, 1 De G. 349; *Ex parte Tomkins*, Sugd. V. & P. 815, 14 ed.

(e) 6 Sim. 281; see *Ord v. Noel*, 5

Mad. 440; *Conolly v. Parsons*, 3 Ves. 628, note.

(f) 23 and 24 Vict. c. 145, ss. 1 and 2. [Since repealed: see *supra*, note (b), and p. 436, note (a).]

[(g) 44 and 45 Vict. c. 41, s. 35.]

(a) 37 & 38 Vict. c. 78.

the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required."

And the *second* section (as to any contract made *after* 31st December, 1874, and subject to any stipulation to the contrary), enacts:—

(1). That "under a contract to grant or assign a *term of years*, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the *freehold*."

(2). That recitals, statements and descriptions of facts, matters, and parties in instruments twenty years old "shall, unless and except so far as they shall be *proved* to be *inaccurate*, be taken to be sufficient evidence of the truths of such facts, matters and descriptions."

(3). That "the inability of the vendor to furnish the purchaser with a *legal covenant*" for production of documents shall not be an objection to the title, if "the purchaser will, on completion of the contract, have an *equitable right* to the production."

(4). That "such covenants for production as the purchaser can and shall require, shall be furnished at *his* expense, and the *vendor* shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser."

(5). That "where the vendor retains *any part* of an estate to which any documents of title relate, he shall be entitled to *retain* such documents."

By the *third* section, it is enacted that "*trustees* who are either vendors or purchasers may sell or buy without excluding the operation of the *second* section."

This express reference to the *second* section, suggests a doubt whether by implication trustees were meant to be excluded from the benefit of the *first* section. It is conceived, however, that no such distinction was intended, and that trustees who buy or sell may take advantage of the general enactment contained in the *first* section.

[46. 44 & 45 Vict. c. 41.—The 3d section of the Con-

[*439] veyancing and Law of Property * Act, 1881, enacts (as to any *sale* made after the 31st December, 1881, and subject to any stipulation to the contrary in the contract of sale) —

(1). That “under a contract to *sell and assign* a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the *leasehold* reversion.”

(2). That “where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.”

(3). That a purchaser shall not require the production, or any abstract or copy of any document “dated or made before the time prescribed by law, or stipulated for commencement of the title, even though the same creates a power subsequently exercised” by an abstracted instrument, or “require any information or make any requisition, objection, or inquiry with respect to any such deed, will or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title is recited, covenanted to be produced or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any document forming part of that prior title are correct, and give all the material contents of the document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, enrolment or otherwise.”

(4). That “where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion.”

(5). That "where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and * further that all rent due under every superior [*440] lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date."

(6). That "on a sale of any property, the expenses of the production and inspection of all documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences and information not in the vendor's possession, and all copies or abstracts of, or extracts from, any documents not in the vendor's possession," if required by a purchaser for any purpose, shall be borne by him (a); "and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

(7). That "on a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense."

And by the 13th section, "on a contract to grant a lease for a term of years, to be derived out of a leasehold interest with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion."

[(a) It has been held that under this section the purchaser must bear the expense of procuring and making an abstract of any deed not in the vendor's possession of which he requires an abstract, even though it

forms part of the title which the vendor is bound to adduce, and the vendor is in a position to compel its production: *Re Johnson and Tustin*, 28 Ch. D. 84; reversed on appeal, 30 Ch. Div. 42.]

And by the 66th section, trustees and their solicitors are exonerated from all liability for omitting to exclude the application of the above-mentioned stipulations to any contract they may enter into, but nothing in the act is to make the adoption in connection with any contract of any further or other stipulations improper.]

47. **Clearing the title.** — Trustees for sale may do all reasonable acts which they are professionally advised are proper for the purpose of clearing the title and completing the sale (*b*).

48. **Succession duty.** — Trustees for sale who are to stand possessed of the proceeds upon trust for one person for life with remainder to another, can, whether the sale be or not exercisable with the consent of the tenant for life or of the successor, *i.e.*, the remainderman, give a good title to the purchaser free from *succession duty*; for the duty [*441] *attaches on the interest of the successor, *i.e.*, the money in the hands of the trustees who are responsible, and the sale is by a title which is paramount to the successor's interest; and if the sale is to be by *consent*, the power of selling free from the duty is by the act not to be thereby prejudiced (*a*). So trustees for sale who are to stand possessed of the proceeds to pay legacies can pass the estate free from duty, for the succession duty does not attach where legacy duty is payable (*b*), and the legacy duty is not a charge on the estate, but is payable in respect of the proceeds in the hands of the trustees (*c*).

49. **Hardship.** — The Court will not enforce a contract against trustees where it presses with extreme *hardship*. Thus, where trustees, not being apprised of the real amount of the incumbrances upon an estate, entered into a personal engagement with the purchaser to clear off all incumbrances, the Court would not compel the trustees to fulfil their con-

(*b*) *Forshaw v. Higginson*, 8 De G. M. & G. 827.

(*a*) 16 & 17 Vict. c. 51, ss. 42, 44; see *Harding v. Harding*, 2 Giff. 507; *Hobson v. Neale*, 8 Exch. 368; *Earl Howe v. Earl of Lichfield*, 2 L. R. Ch.

App. 155; *Dugdale v. Meadows*, 9 L. R. Eq. 212, affirmed on app. 6 L. R. Ch. App. 501.

(*b*) As to leaseholds, see 16 and 17 Vict. c. 51, ss. 1 and 19.

(*c*) 16 & 17 Vict. c. 51, s. 18.

tract, but left the parties to law (*d*), and the bill was dismissed without costs (*e*).

50. **Letting into possession.** — The purchaser, after the contract, should not be let into *possession* of the estate until the completion of the sale by payment of the full purchase-money (*f*).

51. **Of "granting" in the operative part of the conveyance.** — Formerly, in drawing the conveyance, the word "*grant*" being commonly (though erroneously) supposed to contain a warranty (*g*), the trustee, instead of "*granting, bargaining, selling, and releasing,*" was often, from extra caution, made to "*bargain, sell, and release,*" with the omission of the word "*grant*" (*h*). And still, as formerly, in order to secure the trustees from the possibility of parting with any interest vested in them beneficially, or from being construed to guarantee anything beyond the powers of their trust, it is not unusual to insert in the operative part of the instrument the words "*according to their estate and interest as such trustees.*"

52. **Covenants.** — A trustee cannot be compelled to enter into any other covenant for *title* than against incumbrances by his own acts (*i*). But *it would be [*442] prudent in trustees to apprise the public that they

(*d*) *Wedgwood v. Adams*, 6 Beav. 600.

(*e*) S. C. 8 Beav. 103.

(*f*) *Oliver v. Court*, 8 Price, 166, per Chief Baron Richards; see *Browell v. Reed*, 1 Hare, 434.

(*g*) See Co. Lit. 384*a*, note (1), Hargrave and Butler's edit.

(*h*) See now 8 & 9 Vict. c. 106, s. 4.

(*i*) *White v. Foljambe*, 11 Ves. 345, per Lord Eldon; *Onslow v. Lord Londesborough*, 10 Hare, 74, per Cur.; *Worley v. Frampton*, 5 Hare, 560; *Stephens v. Hotham*, 1 K. & J. 571; and *Page v. Broom*, 3 Beav. 36. This is carried to such an extent that, where a lessor grants a lease with a covenant for perpetual renewal, devisees in trust of the lessor, though bound to grant a new lease, are not

bound to enter into a similar covenant. In these cases the Court has, in order to secure the lessee without making the trustees personally liable, declared the right of the lessee to a perpetual renewal, and directed the new lease to contain a recital of the old lease, and of the declaration of the Court in obedience to which the trustees purport to demise; *Copper Mining Company v. Beech*, 13 Beav. 478; *Hodges v. Blagrove*, 18 Beav. 405. So, if A. agrees to grant a lease to B. and B. dies, A. can compel the executors of B. to accept the lease, but the lease is so framed that the executors of B. are guarded against all personal liability; *Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 K. & J. 571; but in the

sell in that character, that the purchaser may not say he was led to suppose from the advertisements of sale, that the vendors were the beneficial proprietors, and that the contract must, therefore, draw with it the usual incidents, and that the purchaser ought to have the benefit of the ordinary covenants. If the trust for sale is to be exercised with the *consent* [or *at the request*] of the *tenant for life* who joins in a sale, he must enter into the usual covenants for title (a).

53. **Mortgagees' covenants.** — *Mortgagees* with a *power of sale* are regarded as trustees, and covenant only against their own acts (b). To the extent of their mortgage money they are beneficially interested, not however as owners of the estate, but only as incumbrancers entitled to a charge.

[54. By the Conveyancing and Law of Property Act, 1881, s. 7, where, in any conveyance made after the 31st December, 1881, any person conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, a covenant against incumbrances by such person in the form stated in the Act is to be deemed to be included in the conveyance, and is by virtue of the Act to be implied, but such covenant is not to be implied unless the person so conveying is in the conveyance expressed to convey in one of the above capacities.

The benefit of the covenant so implied is to be annexed to and go with the estate of the implied covenantee. A covenant so implied may be varied or extended by deed.]

55. **Attested copies and covenant for production.** — It was laid down by Lord Eldon, that *assignees of bankrupts* [*443] * were bound, in case they could not deliver up the title deeds, to furnish the purchaser with *attested copies* and to *covenant for production* of the originals, the covenant to be confined to the period during which the

latter case the V. C. added that if the lease were a *beneficial lease claimed* by the *executors*, that would be a different case, and they must enter into full covenants, p. 580; and see *Staines v. Morris*, 1 V. & B. 12.

(a) *Earl Poulett v. Hood*, 5 L. R. Eq. 116; [*Re Sawyer and Baring's Contract*, 53 L. J. N. S. Ch. 1104; 33 W. R. 26.]

(b) *Sugd. Vend. & Pur.* p. 61, 11th edit.

assignees should continue in office (a). And trustees, where they retain the title deeds, are equally required to give attested copies, and [either to] covenant for production during the period of their own custody, giving at the same time all such right at law or in equity as they lawfully can to call for the production as against the holder for the time being (b), [or else to give a statutory acknowledgment under the recent Act.] It is not easy to suggest a case where upon a sale by trustees the purchaser would not be entitled in equity (which would be sufficient) to call for the production of the deeds, but should there occur a case where the purchaser would not have such a right either at law or in equity, he could not be compelled to complete, but might claim to be discharged from his contract and be paid his costs, which would fall upon the trust estate or the trustees personally, according to the propriety or impropriety of their conduct in proceeding to a sale without guarding themselves by an express condition.

[56. **Statutory acknowledgment.** — Under the Conveyancing and Law of Property Act, 1881 (c), sect. 9, the practice has been introduced of giving an acknowledgment in writing

(a) *Ex parte* Stuart, 2 Rose, 215.

(b) See *Onslow v. Lord Londesborough*, 10 Hare, 74, Sugd. Vend. & Pur. 54, 13th edit.

The following form would, it is conceived, be a proper covenant: "The said A. B., C. D., and E. F., but so as not to render themselves, or any of them, or any of their heirs, executors, or administrators, liable under the present covenant, except so long as they or he respectively shall remain trustees or trustee, and shall as such hold or be entitled to the custody of the deeds and writings hereinafter mentioned, but so nevertheless as to bind so far as can lawfully be done, the holders for the time being of the said deeds and writings, do hereby covenant with the said G. H. that they the said A. B., C. D., and E. F., their heirs, executors, and administrators, shall and will at all times," &c.

Mr. De Morgan has been kind

enough to furnish me with the following form, settled by Lord Eldon's own hand, in a case where Lord Eldon and another were devisees in trust under a will: "Each of them the said John Earl of Eldon and E. S. Thurlow, as such devisees in trust as aforesaid, and for such period only as they or either of them, their or either of their heirs, executors, administrators, or assigns, shall have the custody or lawful power over such deeds, evidences and writings, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said J. P., his heirs, appointees, and assigns, so and in such manner as to bind, so far as is practicable, all and every person and persons in whose custody the same deeds, evidences, and writings now are, or at any time hereafter shall be, that," &c.

[(c) 44 and 45 Vict. c. 41.]

of the right of the purchaser to the production of the documents of title, and to delivery of copies thereof in lieu of the old covenant for production, and with reference to this acknowledgment the following points are noticeable:

[*444] * (1). The person who "retains possession of the documents" (by which, apparently, is meant the person who *has* the documents in his possession, or under his control), and he only can give the statutory acknowledgment.

(2). The acknowledgment binds the documents in the possession or under the control of every person, who from time to time has such possession or control, but binds the "individual possessor or person so long only as he has possession or control thereof."

(3). The acknowledgment does not confer any right to damages for loss or destruction of or injury to the documents from whatever cause arising.

(4). The acknowledgment satisfies any liability to give a covenant for production and delivery of copies of or extracts from documents.

The obligations and liabilities arising under the statutory acknowledgment correspond with those which arose under the old qualified covenant for production usually entered into by trustees independently of the act, and it is conceived that trustees may safely give the acknowledgment for documents in their possession and that they cannot be required to do more than give this acknowledgment.

57. **Statutory undertaking.**—The same section has introduced the practice of giving an undertaking in writing for safe custody of the documents retained, which "imposes on the person giving it and on every person having possession or control of the documents from time to time, but on each individual possessor or person so long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident," and under this, trustees who have the custody of documents as to which a former holder has given the statutory undertaking will be personally liable for their safe custody, but it is conceived

that they will, in the absence of neglect on their part, be entitled to be recouped out of their trust estate any loss they may suffer in respect of the documents.

The undertaking for safe custody involves a personal liability which trustees are not by law bound to take upon themselves and they should accordingly decline to give the statutory undertaking when retaining the possession of documents.]

58. **Sale of leaseholds.**—In a sale of *leaseholds* by trustees who take by *assignment* they cannot, in any case, require from a purchaser a covenant of indemnity against a breach of the covenants; for, as regards *themselves*, they took the lease by assignment without personally *cove- [*445] nanting, and therefore cease to be liable on the assignment over; and, as regards a covenant for the protection of the *settlor*, he has become a stranger by the execution of the trust deed, and the trustees could neither, in the absence of an express stipulation, insist upon a benefit to one with whom there is no existing privity, nor, as they are bound to make the sale the most beneficial to the *cestuis que trust*, could they insert a condition in favour of a stranger which might operate as a discouragement to purchasers (a).

59. **Executor of lessee.**—The *executor* of a *lessee* upon assigning the term would be entitled to such a covenant, his testator's estate being liable under the original covenants of his testator.

60. **Practice of the Court.**—Subject to the effect of the Act to be mentioned presently, where a lessee's estate is in course of distribution under the direction of the Court, a portion of the estate is usually reserved for the purpose of forming an indemnity fund against the covenants of the lease (b), unless the risk be inconsiderable (c). But no indemnity is provided where the testator's estate is not liable, as where the testator himself was not a *lessee*, but the as-

(a) See *Wilkins v. Fry*, 1 Mer. 244; *Garratt v. Lancefield*, 2 Jur. N. S. 177.

(b) *Cochrane v. Robinson*, 11 Sim. 378; *Fletcher v. Stevenson*, 3 Hare, 360; *Dobson v. Carpenter*, 12 Beav.

370; *Hickling v. Boyer*, 3 Mac. & G. 635; *Brewer v. Pocock*, 23 Beav. 310.

(c) *Dean v. Allen*, 20 Beav. 1; *Brewer v. Pocock*, 23 Beav. 310; and see *Reilly v. Reilly*, 34 Beav. 406.

signee of a lease and had entered into no covenants (*d*). And if the executor has assented to the bequest unconditionally, he is held to have waived his claim to indemnity (*e*).

Principle of practice. — It is difficult to say upon what principle this practice of the Court is based. In some of the older cases the judges seem to have thought that it was to indemnify the *executor*. But as the distribution of the assets is made by the *Court*, and is *not the act of the executor*, it is impossible to maintain that the executor can be personally liable for the debt. In other cases the fund is said to be set apart out of regard to the interests of the lessor. But if the lessor can prove by way of claim in the suit, why, should the Court protect one who will not protect himself; and if he cannot prove in the suit (*f*), it seems anomalous that the Court, while it refuses to hear the lessor on the subject of his interest, should deal with the assets behind his [*446] back in respect of such interest. The *whole doctrine, said V. C. Kindersley, is in a very unsatisfactory state, and does not seem to be founded on sound principle (*a*).

22 & 23 Vict. c. 35. — By Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 27), where an *executor* has satisfied all accrued liabilities under a *lease*, and has set apart a fund to answer covenants for expenditure of *fixed sums* on the property (which would not include rents) and assigns the lease to a purchaser, he may distribute the assets without being personally liable to the lessor, who however may still follow the assets in the hands of the recipients.

Practice since the Act. — The practice of the Court for the future has not yet been settled (*b*), but it is presumed that

(*d*) *Garratt v. Lancefield*, 2 Jur. N. S. 177. N. B. It may be collected from the judgment that the ordinary covenant to indemnify had not been entered into by the testator on the occasion of the assignment to him.

(*e*) *Shadbolt v. Woodfall*, 2 Coll. 30; and see *Smith v. Smith*, 1 Dr. & Sm. 384.

(*f*) See *King v. Malcott*, 9 Hare, 692; *Re Haytor Granite Company*, 1

L. R. Eq. 11; *Smith v. Smith*, 1 Dr. & Sm. 387.

(*a*) *Smith v. Smith*, 1 Dr. & Sm. 387.

(*b*) *Smith v. Smith*, 1 Dr. & Sm. 384. In *Reilly v. Reilly*, 34 Beav. 406, the Court after a lapse of eight years, and no claim having been made, distributed the fund which had been set apart for an indemnity.

where a lease is sold under the direction of the Court, and all existing liabilities have been satisfied, and provision made for future fixed sums covenanted to be laid out on the property, the Court will not think it necessary to protect a lessor, who, as the legislature has now pronounced, cannot under such circumstances claim protection out of Court. In other cases the law will remain as it was, and the general principle would appear to be, that the Court should (not by way of indemnity to the executor, except as to costs of resisting proceedings against him, but *ex debito justitiæ* to a *bonâ fide* future creditor) set apart a fund where it plainly appears that future liabilities will arise, and that the whole estate itself is not a sufficient security, and the devisee of the lease cannot give adequate security either by personal undertaking or otherwise. [And in recent cases, both in England (c) and in Ireland (d), the Court has refused to set aside any part of the assets, or to give the executor any further indemnity than that which arises by reason of the administration of the estate by the Court. But where the estate consists to an appreciable extent of leaseholds, which involve a liability in the executor, he is entitled as of right to have the estate administered by the Court for his protection (e).]

61. **Assignment of a chose in action.**—In the assignment of a *chose in action* [not falling within sect. 25 of the Judicature Act, 1873.] the trustee may be required to give a *power of attorney* to receive the money, and to sue in his name, but this should be accompanied by a proviso that no action or suit shall be commenced unless the assignor consent, *or unless the assignee tender a sufficient *indemnity* (a). [*447] [But in the case of an absolute assignment by writing within sect. 25, as the assignee can, by giving notice under the Act, acquire the right to sue at law in his own name for the *chose in action*, it is conceived that a trustee could not be compelled to give such a power of attorney.]

[(c) *Re Bosworth*, 29 W. R. 885; Ir. 199; *Fitzgerald v. Lonergan*, cited 45 L. T. N. S. 136.] 5 L. R. Ir. 203.]

[(d) *Buckley v. Nesbitt*, 5 L. R.

[(e) *Re Bosworth*, 45 L. T. N. S. 136.]
(a) *Ex parte Little*, 3 Moll. 56.

62. **Sale by mortgagee.**—In a *mortgage* accompanied with a *power of sale*, the mortgagee, who is a *quasi* trustee, can under the power make a title to the purchaser without the concurrence of the mortgagor (*b*); and a clause in the mortgage deed that the mortgagor shall, if required, be a party to the conveyance, is considered a contract for the exclusive benefit of the mortgagee, and not as imposing the necessity of procuring the mortgagor's consent to the sale (*c*).

63. **Whether the *cestuis que trust* should be parties.**—If the trustees have a power of signing discharges for the purchase-money, the *cestuis que trust* need not be made parties to the conveyance (*d*); but as trustees are bound to covenant against their own incumbrances only, the *cestuis que trust*, where it is practicable, are usually made parties to the deed, that the purchaser may have the benefit of their covenants for title according to the extent of their respective interests (*e*). In sales, however, under the direction of the Court of Chancery, it is the rule *not* to make the *cestuis que trust* parties; for this would involve the necessity of previously inquiring *who* are beneficially interested, and in *what* proportions, whereas it is a common proceeding of the Court to order a sale in the first instance, and leave the rights of the respective parties to be settled by a subsequent adjudication (*f*).

[64. Trustees for sale having, under the recent enactments, power to give a complete discharge for the purchase-money, are persons "absolutely entitled" within the meaning of the Lands Clauses Consolidation Act, 1845, s. 69, and are entitled to have money in Court, under that Act, paid out to them without bringing their *cestuis que trust* before the Court (*g*). And it makes no difference that the trust for

(*b*) *Corder v. Morgan*, 18 Ves. 344; *Clay v. Sharpe*, cited *Id.* 346, note (*b*); *Alexander v. Crosbie*, 6 Ir. Eq. Rep. 518.

(*c*) *Corder v. Morgan*, 18 Ves. 347, *per* Sir W. Grant.

(*d*) See *Binks v. Lord Rokeby*, 2 Mad. 227.

(*e*) See *Re London Bridge Acts*, 13 Sim. 176.

(*f*) *Wakeman v. Duchess of Rutland*, 3 Ves. 233, 504; affirmed in D.

P. 8 B. P. C. 145; *Colston v. Lilley*, 3 May, 1855, V. C. Stuart at chambers; *Wyman v. Carter*, 12 L. R. Eq. 309; *Re Williams's Estate*, 5 De G. & Sm. 515; *Cottrell v. Cottrell*, 2 L. R. Eq. 330; and see *Loyd v. Griffith*, 3 Atk. 264; *Freeland v. Pearson*, 7 L. R. Eq. 246.

[(*g*) *Re Hobson's Trusts*, 7 Ch. D. 708; *Re Thomas's Settlement*, W. N. 1882, p. 7.]

sale is at the request of some other person, where that person concurs with the trustees in asking for the payment to them of the money.^{1]}

65. **Receipt of money by solicitor or agent.**—The question whether, where trustees have given a written authority to their solicitor or agent to receive the purchase-money, * the purchaser can insist upon paying it to the trus- [*448] tees personally, or to their joint account at a bank designated by them, has been the subject of discussion and difference of opinion in the recent case of *Re Bellamy* and the Metropolitan Board of Works (*a*), where it was held by L. JJ. Cotton and Bowen, *diss.* L. J. Baggally, and overruling *Kay, J.*, that in the absence of “special circumstances which would justify and render it necessary for trustees to grant power to somebody else to receive purchase-money for them,” the purchaser could insist on paying his purchase-money in one of the ways suggested; and in a subsequent case, *Kay, J.*, following *Re Bellamy*, held that the purchaser could require *all the trustees* to attend personally to receive the purchase-money, if the money was to be paid to them directly (*b*). Where the circumstances are such as justify trustee in authorising their solicitor to receive the purchase-money, the 56th section of the Conveyancing and Law of Property Act, 1881 (*c*), will apply, and the production of the deed, as mentioned in that section, by the solicitor will supply the place of a written or express authority to him (*d*); but this section has not altered or enlarged the powers of trustees as to giving such authority. In cases not falling within that section] payment to a solicitor or agent *without* a written or other express authority from the trustees, will be no discharge (*e*). However, if the money has been put into a

[*(a)* 24 Ch. D. 387; but see] *Robertson v. Armstrong*, 28 Beav. 123; *Hope v. Liddell*, 21 Beav. 202 [*Webb v. Ledsam*, 1 K. & J. 386; *Ferrier v. Ferrier*, 11 L. R. Ir. 56;] and see *Sugden's Vend. & Purch.* 14th ed. 667.

[*(b)* *Re Flower* and Metropolitan Board of Works, 27 Ch. D. 592.]

[*(c)* 44 & 45 Vict. c. 41, s. 56.]

[*(d)* *Re Bellamy* and Metropolitan Board of Works, 24 Ch. D. 387.]

[*(e)* *Re Fryer*, 3 K. & J. 317; and see *Viney v. Chaplin*, 2 De G. & J. 468; [*Ex parte Swinbanks*, 11 Ch. D. 525.]

¹ *Re Ward's Estates*, 28 Ch. D. 100.

channel by which it may reach the hands of the vendor, and the vendor by his agent delivers a receipt for it to the purchaser, the vendor cannot afterwards throw the loss of the money on the purchaser (*f*).

66. **Deposit money.** — When trustees sell by auction, the *auctioneer* is their agent, and the trustees will be answerable if they improperly trusted him, or be guilty of any unnecessary delay in recovering the deposit from him (*g*).

67. **Trustees bound to answer inquiries.** — Trustees for sale for *payment for debts* are of course bound at any time to answer inquiries by the author of the trust, or the persons claiming under him, as to what estates have been sold and what debts have been paid (*h*).

[*449] *68. **Custody of vouchers.** — When the affairs of the trust have been finally settled, the trustees will be entitled to the possession of the *vouchers* as their discharge to the *cestuis que trust*; but the *cestuis que trust* will have a right to the inspection of them (*a*); but not to copies without paying for them.

69. **Land discharged when money raised.** — The *land* is discharged so soon as the fund has been actually raised, even though the proceeds may be misapplied, and do not reach their proper destination. The remedy of the parties aggrieved is against the trustees personally, without any *lien* upon the estate (*b*). And if a legacy be charged on land (either by the creation of a term or without a term), on the *insufficiency of the personal estate*, and the personal estate was originally sufficient, but becomes insufficient by the *devastavit* of the executor, the land is discharged (*c*) unless the devisees of the land are also the persons by whose default the insufficiency arose (*d*).

(*f*) *West v. Jones*, 1 Sim. N. S. 205.

(*g*) See *Edmonds v. Peake*, 7 Beav. 239.

(*h*) *Clarke v. Earl of Ormonde*, Jac. 120, *per* Lord Eldon.

(*a*) *Ib. per eundem*.

(*b*) *Anon.* 1 Salk. 153; *Juxon v. Brian*, Pr. Ch. 143; *Carter v. Barnardiston*, 1 P. W. 505; see 518; *Hutchinson v. Massareene*, 2 B. & B.

49; and see *Omerod v. Hardman*, 5 Ves. 736; *Dunch v. Kent*, 1 Vern. 260; *Culpepper v. Aston*, 2 Ch. Ca. 115; *Harrison v. Cage*, 2 Vern. 85; *Hepworth v. Hill*, 30 Beav. 476.

(*c*) *Richardson v. Morton*, 13 L. R. Eq. 123. But see *contra*, *Re Massey*, 14 Ir. Rep. 355.

(*d*) *Humble v. Humble*, 2 Jur. 696; *Howard v. Chaffers*, 2 Dr. & Sm. 236.

70. **Effect of administration suit.** — The effect of an *administration suit* upon a trust for sale is that the trustees do not lose their powers, but must exercise them under the direction of the Court, and if they have a *legal power* of sale they can execute it with the sanction of the Court for the purpose of passing the legal estate. But the power, though exercised under the eye of the Court, must of course be pursued as strictly as if there were no suit, and though the trustees may be able to pass the legal estate, yet in equity no good title will be conferred as against a *cestui que trust* who was not a party to the suit, or otherwise bound by the exercise of the power. Trustees for sale, with a power of signing receipts, can, if there be no suit, convey the estate, and sign a valid discharge for the purchase-money, but if the Court and not the trustees sell the estate, the purchaser would not acquire a good title as against any *cestui que trust* who was not a party to the suit or not bound by the order. These observations must not be taken to interfere with the legal power of an *executor*, even after decree, to deal with the general personal assets of the testator (*e*).

[71. If in an administration action, or an action for the execution of the trusts of a written instrument, a sale is ordered of any *property vested in any executor, [*450] administrator or trustee, the conduct of the sale is to be given to such executor, administrator or trustee, unless the Court otherwise directs (*a*).]

SECTION II.

THE POWER OF TRUSTEES TO SIGN DISCHARGES FOR THE PURCHASE-MONEY.¹

The power of trustees to sign discharges for the purchase-money resolves itself into two questions: — First: Are the

(*e*) *Berry v. Gibbons*, 8 L. R. Ch. App. 747.

[(*a*) Rules of The Supreme Court Ord. 50, R. 10. Where there were four trustees, and one, who was also

tenant for life, was plaintiff, and the others were defendants, the conduct of the sale was given to the three defendant trustees, *Re Gardner*, 48 L. J. N. S. Ch. 644.]

¹ *Trustees' receipts.* — The rules are not as exacting in America as in England. A payment to one trustee is valid, though there are others; *Bowes v.*

trustees justified in making the *sale* at all? and, Secondly: Supposing the sale itself to be proper, is the purchaser bound to see to the *application* of his purchase-money?

First. Are the trustees justified in proceeding to a sale?

1. *Trust for sale for payment of debts.* — If a testator *devise an estate* to trustees, and direct a sale of it for payment of debts *on the insufficiency of the personal assets*, the trustees *ought* not to dispose of the realty, until it appears that the personal fund is not equal to meet the demands of the creditors. But the point we have here to consider is, how will the *purchaser* be affected, and, as he has no means of investigating the accounts, he is not to be prejudiced should it prove eventually that the personalty is sufficient (*b*). All that could reasonably, and which perhaps *would* be required of him, is, that he should apply to the executor, where the trustee does not sustain that character, and ask if the necessity for the sale has arisen. However, a purchaser is prevented in such a case from dealing exclusively with the trustee out of Court, where a *suit* has been instituted for the administration of the estate (*c*). And the Court itself cannot make a good title where it has been found in the suit that *all the debts have been paid* (*d*).

2. *Power of sale on insufficiency of personal estate.* — But if a testator give not the *estate* but a *power of sale* only [*451] to *his trustees, and that conditional on the insufficiency of the personal estate, then the purchaser must at his peril ascertain that the power can be exercised (*a*). The difference between a trust and a power is this. In the former case, the trustees, having the legal estate, can trans-

(*b*) *Culpepper v. Aston*, 2 Ch. Ca. 116, 223, *per* Lord Nottingham; and 115, *per* Lord Nottingham; *Keane v. Robarts*, 4 Mad. 356, *per* Sir J. Leach; and *supra*.

Co. Lit. 290, b, note by Butler, sect. 14; *Shaw v. Borrer*, 1 Keen, 559; *Eq. 348.*

Greetham v. Colton, 11 Jur. N. S. 848; (*a*) *Culpepper v. Aston*, 2 Ch. Ca. 221; *Dike v. Ricks*, Cro. Car. 335; but see *Fearne's P. W.* 121.

(*c*) *Culpepper v. Aston*, 2 Ch. Ca. S. C. Sir W. Jones, 327.

Seeger, 8 Watts & S. 222. See note on trustee's liability. In the United States deeds contain a receipt for the purchase price, and these deeds are necessarily signed by all the trustees, otherwise an independent receipt should be had, signed by all the trustees.

fer it to the purchaser by their ownership; and equity, as the purchaser had no opportunity of discovering the true state of things, will not allow his title to be impeached. But where there is a power merely, the insufficiency of the personal estate is a condition precedent; and if it did not pre-exist in fact, the power never arose, and the purchaser took nothing by the assumed execution of it.

3. *Case of selling more than the trust requires.* — A purchaser is not bound to ascertain whether *more* is offered for sale than is sufficient to answer the purposes of the trust: for how is the purchaser to know what exact sum is wanted, without investigating the accounts? And if the sale be by auction the trustees cannot tell *a priori* what the property will fetch. Besides, the trustees are entitled, as incident to their office, to raise their costs and expenses (*b*).

4. *Pierce v. Scott.* — But where a testator directed on the insufficiency of his personal estate a sale in the first instance of estate A., and, should that not answer the purpose, then of estate B., and the trustees, *fifteen* years after the testator's death, contracted for the sale of B. first, and then filed a bill for specific performance, alleging the existence of debts, and that A. was already in mortgage, or otherwise charged to the full value, the Court, considering it was unlikely that creditors would have lain by for so many years, and that the non-existence of debts might therefore be suspected, and that what was ground for suspicion might be deemed notice to a purchaser, determined against the title (*c*).

Secondly. Supposing the sale to be proper, is the purchaser bound to see to the *application* of his purchase-money? ¹

(*b*) *Spalding v. Shalmer*, 1 Vern. 301; *Thomas v. Townsend*, 16 Jur. 736.

(*c*) *Pierce v. Scott*, 1 Y. & C. 257.

¹ *Application of the purchase-money.* — If the trust is general to pay debts, the purchaser need not see to the application of the purchase-money; *Goodrich v. Proctor*, 1 Gray, 570; *Potter v. Gardner*, 12 Wheat. 498; *Hauser v. Shore*, 5 Ired. Eq. 357; *Laurens v. Lucas*, 6 Rich. Eq. 217; or if it is to pay debts and legacies; *Andrews v. Sparhawk*, 13 Pick. 393; *Dewey v. Ruggles*, 25 N. J. Eq. 35; *Sims v. Lively*, 14 B. Mon. 435; *Grant v. Hook*, 13 S. & R. 259; or to pay debts and use balance in a certain way; *Stall v. Cincinnati*, 16 Ohio St. 169. But if certain debts or legacies are to be paid from the proceeds of a

Lord St. Leonards' Act. — We must here advert *in limine* to some important recent enactments. By *Lord St. Leonards' Act*, 22 & 23 Vict. c. 35, s. 23 (passed 13th August, 1859), it is declared that "the *bond fide* payment to and the receipt of any person to whom any *purchase* or *mortgage* money *shall be payable* upon any *express* or *implied* trust *shall* effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary *shall be* expressly declared by the instrument creating the *trust or security." It will be observed, 1. That the Act applies not to all monies subject to a trust, but only to monies arising from *sales* and *mortgages* and subject to a trust. 2. That the language of the section, more particularly of the latter part of it, is in the future tense, so that the enactment is not to be retrospective. If future settlors are to have the option of excluding the operation of the Act, it should not affect prior settlors who had no such option. 3. As regards trusts or mortgages created by instruments since the date of the Act, it would seem that to the extent of sale monies and mortgage monies the whole doctrine in equity of seeing to the application of money has been swept away. It cannot be said that where A. is trustee for B. the money is payable to B. and not to A., and that therefore the clause shall not apply, for the doctrine of equity is that the money is *payable* to A., but the purchaser or mortgagee is bound to see it properly *applied* by A.

sale, then the purchaser ordinarily must see the money properly applied; *Swasey v. Little*, 7 Pick. 296; *Bugbee v. Sargent*, 23 Me. 269; *Hoover v. Hoover*, 5 Barr. 351; *Leavitt v. Wooster*, 14 N. H. 560; *Lupton v. Lupton*, 2 Johns. Ch. 614; 3 Redf. Wills, 235. See further, *Gardner v. Gardner*, 3 Mason, 178; *Duffy v. Calvert*, 6 Gill, 487; *Hauser v. Shore*, 5 Ired. 357; *St. Mary's Church v. Stockton*, 4 Halst. Ch. 520. If a purchase is made under decree, the application of the purchase-money is immaterial; *Wilson v. Davisson*, 2 Rob. (Va.) 385; *Coombs v. Jordan*, 3 Bland, 284. The American rule is much less strict regarding the application of the money, than the English, *Redheimer v. Pyron*, 1 Speer's Eq. 141; *Rutledge v. Smith*, 1 Bush. Eq. 283. The purchaser will not be protected if he had any notice of an intention to misapply the purchase-money; *Shaw v. Spencer*, 100 Mass. 388; *Clyde v. Simpson*, 4 Ohio St. 445; *Williamson v. Morton*, 2 Md. Ch. 94.

The settlor's intention, if it can be determined, has much to do with the necessity of looking after the application of the money.

Lord Cranworth's Act. — By *Lord Cranworth's Act*, 28 & 24 Vict. c. 145, s. 29 (passed 28th August, 1860), it was enacted that "The receipts in writing of any trustees or trustee for *any money* payable to them or him by reason or in exercise of any *trusts* or *powers*" should be good discharges; but by section 84, the operation of the Act was expressly confined to instruments executed after the passing of the Act.

[44 & 45 Vict. c. 41. — By the Conveyancing and Law of Property Act, 1881, which repealed the 29th section of Lord Cranworth's Act, "the receipts in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power" are made sufficient discharges, and the section applies to trusts created either before or after the commencement of the Act (a).]

As the clauses in [the Acts prior to the Conveyancing and Law of Property Act, 1881, were not retrospective, and questions may still arise on titles as to the validity of receipts by trustees who had no express powers of signing receipts,] it is necessary to consider generally and apart from legislative enactment the power of trustees for sale to sign receipts.

1. **Principle of requiring a purchaser to see to the application of his purchase-money.** — As a general rule, if a person have in his hands money or other property to which another person is entitled, he cannot discharge himself from liability but by payment or transfer to the true owner. If an estate be vested in A. upon trust to sell and *divide the [*458] proceeds between B. and C., in a Court of *law* the absolute ownership is in A., and his receipt, therefore, will discharge the purchaser; but in equity B. and C., the *cestuis que trust*, are the true proprietors, and A. is merely the instrument for the execution of the settlor's purpose, and the receipt, therefore, to be effectual, must be signed by B. and C. (a).

[(a) 44 & 45 Vict. c. 41, ss. 36, 71.]

(a) See *Weatherby v. St. Giorgio*, 2 Hare, 624. The power of the vendor to sign a discharge for the pur-

chase-money is a question not of conveyance but of title; *Forbes v. Peacock*, 12 Sim. 621.

2. **The rule controlled by the intention of the settlor.**—Such is the *prima facie* rule in trusts; but in every instance it is liable to be controlled and defeated by an intention to the contrary collected from the instrument creating the trust, whether that intention be *expressed* or *implied*.

3. **Either expressed.**—The former is the case, if the settlor direct in *express* terms that the receipts of A., the trustee, shall discharge the purchaser from seeing to the application of the purchase-money; for B. and C. cannot at the same moment claim under and contradict the instrument—they cannot avail themselves of the sale, and reject the proviso affecting the receipt.

The words in a *power of attorney*, “to sign discharges in the name of the assignor or otherwise, and to do all other acts as the principal might have done,” have been held to carry such a direction (b) where not controlled by a subsequent receipt clause tending to negative that intent (c). But the receipt clause has not always been liberally construed; as where trustees were entitled to receive a sum of *stock* with a power of varying securities, a receipt signed for *cash* was held to be no discharge, though the Court said that had there been any indication of an intention to exercise the power of varying securities for which cash would be required, the decision might have been different (d).

[*454] It would *have been more satisfactory had the Court

(b) *Binks v. Lord Rokeby*, 2 Mad. 227; see 238, 239; *Desborough v. Harris*, 5 De G. M. & G. 439. In this case L. C. Cranworth considered that an assignment of a policy by way of mortgage vests a power of signing receipts in the mortgagee from the nature of the case, and independently of any express power of signing receipts, for the possession of the policy is evidence that something is due, and the Insurance Company cannot be expected to take the account between mortgagor and mortgagee. Of course it would be otherwise if the company had express notice that the mortgage had been satisfied. The difficulty felt by the insurance companies in such

cases has been, that after paying upon the equitable title they might incur costs pending an action upon the legal title. However, a defendant may now plead an equitable defence at law; and if successful upon the equitable defence would recover his costs in the action. See further *Ottley v. Gray*, 16 L. J. N. S. Ch. 512; *Curton v. Jellicoe*, 14 Ir. Ch. Rep. 180. A late Act has enabled the assignee of a policy to bring an action in a court of law. 30 & 31 Vict. c. 144, s. 1. And see 36 & 37 Vict. c. 66.

(c) *Brasier v. Hudson*, 9 Sim. 1.

(d) *Pell v. De Winton*, 2 De G. & J. 13.

held that as the trust fund in the hands of the trustees in the shape of cash did not necessarily imply a breach of trust the receipt was sufficient.

4. *Or implied.* — In what cases a power of signing receipts is *implied*, has never been satisfactorily ascertained. However, two principles appear to be the basis upon which most of the distinctions taken by the Courts have been founded.

5. *Direction to sell implies power in some one to sign discharges at time of sale.* — *First.* In the creation of a trust for *immediate* sale, it is implied that a legal and equitable discharge for the purchase-money shall be *signed by some one at the time of the sale*. There can be no conveyance of the estate without payment of the money, and there can be no such payment without a complete discharge. Should the settlor have contemplated a sale at a time when, as he must have known, the *cestuis que trust*, or some of them, were either not in existence, or not of capacity to execute legal acts, the intention must be presumed that the receipts of the trustees should be a release to the purchaser.

Balfour v. Welland. — Thus, where a deed was executed in India for payment of debts, with a proviso that creditors in India should be allowed six months to come in, and those in Europe eighteen months, and if any were under disability, they should be further allowed the like periods from the time the disability ceased, Sir W. Grant said, "The deed very clearly confers an *immediate* power of sale for a purpose that cannot be *immediately* defined. It is impossible to contend that the trustees might not have sold the whole property at any time they thought fit after the execution of the deed, and yet it could not be ascertained, until the end of eighteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should of themselves be able to give a discharge for the produce, for the money could not be paid to any other person than the trustees" (a).

(a) *Balfour v. Welland*, 16 Ves. 151, see 156.

Case of infancy.—So where A. devised certain lands to his children, some of whom were *infants*, “the same to be sold when the executors and trustees of his will should see proper, and the purchase-money to be equally and severally divided amongst his above-named children,” Sir J. Leach said, “It is plain the testator intended that the trustees should have an immediate power of sale. Some of the children were infants, and not capable of signing receipts. [*455] I must therefore *infer, that the testator meant to give to the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose” (a).

As to cestuis que trust out of the jurisdiction.—As to *cestuis que trust* who, after the date of the instrument, go out of the jurisdiction, or are otherwise incapacitated to concur, the general rule does not apply, for it cannot be said that the settlor meant the trustees to sign receipts for them, the presumption being the other way.

6. Where trust is annexed to the purchase-money it is implied that the trustee shall apply it. — *Secondly*. If a sale be directed, and the proceeds are not simply to be paid over to certain parties, but there is a *special* trust annexed, the inference is, that the settlor meant to confide the execution of the trust to the hands of the trustee, and not of the purchaser, and that the trustee therefore can sign a receipt (b).

Mr. Booth's opinion.—An opinion of Mr. Booth shows that even in his time regard was had to the nature of the trust in

(a) *Sowarsby v. Lacy*, 4 Mad. 142; *Lavender v. Stanton*, 6 Mad. 46; and see *Breedon v. Breedon*, 1 R. & M. 413; *Cuthbert v. Baker*, Sugd. Vend. & Purch. 842, 843, 11th ed.

(b) *Doran v. Wiltshire*, 3 Sw. 699; *Balfour v. Welland*, 16 Ves. 157; *Wood v. Harman*, 5 Mad. 368; *Locke v. Lomas*, 5 De G. & Sm. 326. See *Glynn v. Locke*, 3 Dr. & War. 11; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342. In *Cox v. Cox*, 1 K. & J. 251, Vice-Chancellor Wood held, that a power of signing receipts was by no means one inserted as of course in legal in-

struments, but often excluded, and when excluded, was never implied, except under very special circumstances. The question in that case arose upon the construction of a will which gave to the tenant for life the like powers of selling and exchanging as were contained in a settlement referred to, and in which were, not only powers of sale and exchange, but also a power of signing receipts, and the Vice-Chancellor was of opinion that the powers of sale and exchange only, without the power of signing receipts, were incorporated by reference.

exempting the purchaser from liability. A testator had directed his trustees to sell and invest the proceeds upon the trusts thereafter mentioned, and then gave his wife an annuity of 50*l.* a year, for her life, to be paid out of the proceeds, and subject thereto, gave the fund to his son; but in case of his death under twenty-one, to the person entitled to his Taunton lands. Mr. Booth wrote, "I am of opinion, that all that will be incumbent on the purchaser to see done will be to see that the trustees invest the purchase-money, in their names, in some of the public stocks or funds, or on Government securities, and in such case the purchaser will not be answerable for any misapplication, after such investment of the money, of any monies which may arise by the dividends or interest, or by any disposition of such funds, stocks, or securities, *it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the transaction *for the purchase was carrying on, and there- [456] fore the testator must be supposed to place his sole confidence in the trustees, and this is the settled practice in these cases, and I have often advised so much, and no more, to be done.*" And in this opinion Mr. Wilbraham also concurred (a).

7. *Trust to pay debts.* — To the principle under consideration is referable the well-known rule, that a purchaser is not bound to see to the application of his money where the trust is for payment of *debts generally*; for to ascertain who are the creditors, and what is the amount of their respective claims, is matter of trust involving long and intricate accounts, and requiring the production of vouchers, which the purchaser would have no right to require (b). And mere

(a) 2 Cas. and Opp. 114.

(b) *Forbes v. Peacock*, 11 Sim. 152; and see S. C. 12 Sim. 528; 1 Ph. 717; *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Corser v. Cartwright*, 7 L. R. H. L. 731; *Dowling v. Hudson*, 17 Beav. 248; *Culpepper v. Aston*, 2 Ch. Ca. 223; *Watkins v. Cheek*, 2 S. & S. 205, per Sir J. Leach; *Anon. Mos.* 96; *Hardwicke v. Mynd*, 1 Anst.

109; *Johnson v. Kennett*, 3 M. & K. 630, per Lord Lyndhurst; *Rogers v. Skillicorne*, Amb. 189, per Lord Hardwicke; *Walker v. Smalwood*, Id. 677, per Lord Camden; *Barker v. Duke of Devonshire*, 3 Mer. 310; *Abbott v. Gibbs*, 1 Eq. Ca. Ab. 358; *Binks v. Rokeby*, 2 Mad. 238, per Sir T. Plumer; *Dunch v. Kent*, 1 Vern. 260, admitted; *Elliot v. Merryman*, Barn.

absence of statement of the purpose for which the money is wanted will not make a purchaser or mortgagee liable on the ground of presumed knowledge that the money was to be applied otherwise than for payment of debts (c). So if the trust be for payment of a *particular* debt named, and of the testator's *other* debts (d). So if the trust be for payment of debts and *legacies*, the purchaser is equally protected; for as the discharge of the debts must precede that of the legacies, and the purchaser is not called upon to mix himself up with the settlement of the debts, he is necessarily absolved from all liabilities in respect of the legacies (e).

8. *Scheduled debts or legacies*. — But if the trust [*457] be for payment of *particular* or *scheduled* *debts only (a), or of *legacies only* (b), then, as there is no trust to be executed requiring time or discretion, but the purchase-money is simply to be distributed amongst certain parties, there is no reason why the purchaser should not, under the general rule, be expected to see that the purchase-money finds its way into the proper channel.

Late Assets Act. — And the purchaser, where legacies only are charged, is still bound to see to the application of his

78; *Smith v. Guyon*, 1 B. C. C. 186, and cases cited *Ib.* note; *Ithell v. Beane*, 1 Ves. 215; *per Lord Hardwicke*; *Lloyd v. Baldwin*, *Ib.* 173, *per eundem*; *Dolton v. Hewen*, 6 Mad. 9; *Ex parte Turner*, 9 Mod. 418, *per Lord Hardwicke*; *Gosling v. Carter*, 1 Coll. 644; *Eland v. Eland*, 1 Beav. 285; S. C. 4 M. & Cr. 420; *Jones v. Price*, 11 Sim. 557; *Currer v. Walkley*, 2 Dick. 649, corrected from Reg. Lib. 3 *Sugd. Vend. & Purch.* 168, 10th ed.

(c) *Corser v. Cartwright*, 7 L. R. H. L. 731.

(d) *Robinson v. Lowater*, 17 Beav. 592; 5 De G. M. & G. 272.

(e) *Rogers v. Skillicorne*, Amb. 188; *Smith v. Guyon*, 1 B. C. C. 186; *Jebb v. Abbott*, and *Benyon v. Gollins*, cited Co. Lit. 290 b. note by *Butler*; *Williamson v. Curtis*, 3 B. C. C. 96; *Johnson v. Kennett*, 3 M. & K. 630; *per Lord Lyndhurst*; 6 Ves. 654, note (a); *Watkins v. Cheek*, 2

S. & S. 205, *per Sir J. Leach*; *Eland v. Eland*, 1 Beav. 235; S. C. 4 M. & Cr. 420; *Page v. Adam*, 4 Beav. 269; *Forbes v. Peacock*, 12 Sim. 628; 1 Ph. 717.

(a) *Doran v. Wiltshire*, 3 Sw. 701, *per Lord Thurlow*; *Smith v. Guyon*, 1 B. C. C. 186, *per eundem*, and cases cited, *Ib.* note; *Rogers v. Skillicorne*, Amb. 189, *per Lord Hardwicke*; *Humble v. Bill*, 1 Eq. Ca. Ab. 359, *per Sir N. Wright*; *Anon. Mos.* 96; *Spalding v. Shalmer*, 1 Vern. 303, *per Lord North*; *Abbot v. Gibbs*, 1 Eq. Ca. Ab. 358; *Elliot v. Merryman*, Barn. 81, *per Sir J. Jekyll*; *Binks v. Rokeby*, 2 Mad. 238, *per Sir T. Plumer*; *Ithell v. Beane*, 1 Ves. 215, *per Lord Hardwicke*; *Lloyd v. Baldwin*, 1 Ves. 173, *per eundem*; and see *Dunch v. Kent*, 1 Vern. 260; *Culpepper v. Aston*, 2 Ch. Ca. 223.

(b) *Johnson v. Kennett*, 3 M. & K. 930; *Horn v. Horn*, 2 S. & S. 448.

money, though by 3 & 4 W. 4, c. 104, the real estate of all persons deceased since the 29th of August, 1833, is liable, in the hands of the heir or devisee, to the payment of debts generally, whether by specialty or simple contract (*c*).

9. **Where, notwithstanding a charge of debts, the purchaser must see to the application of his money.**—And even where the estate is subjected by the testator to a trust for payment of debts generally, the purchaser will not be indemnified by the receipt of the trustee if there be any collusion between them (*d*); or if the purchaser have notice from the intrinsic evidence of the transaction that the purchase-money is intended to be misapplied (*e*); or if a suit has been instituted which takes the administration of the estate out of the hands of the trustees (*f*); and these doctrines, it is conceived, are not affected by the clauses in Lord St. Leonards' and Lord Cranworth's Acts, [and the late Conveyancing Act] which apply only to *bond fide* payments.

10. **Purchase from trustees after a length of time.**—And if the purchaser is dealing with trustees at a great distance of time, and when the trust ought long since to have been executed, the purchaser is bound to enquire and satisfy himself to a fair and reasonable extent, that the trustees are acting in the discharge of their duty (*g*). But where *twenty-seven* years had elapsed, and the beneficiaries subject to the charge had been let into possession, and the purchaser asked if there were any debts * and the vendors declined to answer, it was held that the vendors could make a good title (*a*), and Lord Romilly observed that he had known so many cases where after distribution of the assets, debts had appeared which did not exist at the death

(*c*) *Horn v. Horn*, 2 S. & S. 448.

(*d*) *Rogers v. Skillcorne*, Amb. 189, per Lord Hardwicke; *Eland v. Eland*, 4 M. & Cr. 427, per Lord Cottenham.

(*e*) *Watkins v. Cheek*, 2 S. & S. 199, *Eland v. Eland*, 4 M. & Cr. 427, per Lord Cottenham; *Burt v. Trueman*, 6 Jur. N. S. 721; and see *Stroughill v. Anstey*, 1 De G. M. & G. 648; *Colyer v. Finch*, 5 H. L. Ca. 923.

(*f*) *Lloyd v. Baldwin*, 1 Ves. 173.

(*g*) *Stroughill v. Anstey*, 1 De G. M. & G. 654, per Lord St. Leonards; and see *Forbes v. Peacock*, 11 Sim. 502; 12 Sim. 528; 11 M. & W. 637; 1 Ph. 717; *Devaynes v. Robinson*, 24 Beav. 98; *Sabin v. Heape*, 27 Beav. 553; *McNeillie v. Acton*, 2 Eq. Rep. 21.

(*a*) *Sabin v. Heape*, 27 Beav. 553.

of the testator, but which arose subsequently out of obligations entered into by him, that a very liberal term ought to be allowed for the exercise of the power of sale (*b*). [The Court of Appeal has, however, recently expressed an opinion that twenty-seven years is too long a period, and laid down the rule that for a period of twenty years from the testator's death a purchaser should not be bound or entitled to ascertain whether the debts were paid, but that after the lapse of that period it is fair to presume that the debts have been paid and the purchaser is bound to enquire (*c*), and this rule has been followed in Ireland (*d*).]

11. *Power of signing receipts a question of intention at the date of the instrument.* — As the exemption of the purchaser from seeing to the application of the purchase-money depends as a general rule upon the settlor's *intention*, the question must be viewed with reference to the date of the instrument, and not as affected by circumstances which have subsequently transpired (*e*). Thus, if a trust be created for payment of debts and legacies, and the trustees, after full payment of the debts contract for the sale of the estate, the purchaser will not, upon this principle, be bound to see to the application of the money in payment of the legacies (*f*).

12. *Forbes v. Peacock.* — In *Forbes v. Peacock* (*g*), a testator directed his *debts to be paid*, and gave the estate to his wife (whom he appointed his executrix) for life, subject to his debts and certain legacies, and *empowered* her to sell the estate in her lifetime, and *directed* that if it were not sold in her lifetime, it should be *sold at her death* and the proceeds applied in a manner showing that they were intended to pass through the hands of the *executors*, and the testator requested certain persons to act as *executors* and *trustees* with his wife. The widow lived twenty-five years, and after her

(*b*) *Ib.* 560.

(*c*) *Re Tanqueray-Willaine* and *Landau*, 20 Ch. D. 465.]

(*d*) *Re Molyneux and White*, 18 L. R. Ir. 382.]

(*e*) See *Balfour v. Welland*, 16 Ves. 156; *Johnson v. Kennett*, 3 M. & K. 631; *Eland v. Eland*, 4 M. & Cr. 428.

(*f*) *Johnson v. Kennett*, 3 M. & K. 624, reversing S. C. 6 Sim. 384; *Eland v. Eland*, 4 M. & Cr. 420; *Page v. Adam*, 4 Beav. 269; *Stroughill v. Anstey*, 1 De G. M. & G. 635.

(*g*) 11 Sim. 152; 12 Sim. 528; 11 M. & W. 637; 1 Ph. 717; see *Stroughill v. Anstey*, 1 De G. M. & G. 650.

death the surviving executor contracted for the sale of the estate. The Vice-Chancellor of England held that, after so long a lapse of time from the testator's death, the purchaser had a right to ask if * the debts had been paid, and if [*459] he received no answer, it amounted to notice that they had been paid, and he must see to the application of his purchase-money. The V. C. observed, "When the objection is made by the purchaser that the executors cannot make a good title because all the debts have been paid, *if the question is put by him simply, are there or are there not any debts remaining unpaid, he has a right to an answer*" (a). And on a subsequent day he observed, "Here the purchaser has asked the executor whether any of the testator's debts were unpaid at the date of the contract, *and the executor refused to give him an answer*. Under these circumstances, if it should turn out that all debts were paid, I should hold that the purchaser had notice of that fact, and that he was bound to see that his purchase-money was properly applied" (b).

It is evident that this doctrine was not in accordance with former decisions, and the cause was carried upon appeal to the Lord Chancellor, when the decision below was reversed (c). Lord Lyndhurst said, "If the purchaser had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust, and

(a) 12 Sim. 537; see *Sabin v. Heape*, 27 Beav. 553. In the case of *A. Solomon, vendor, and F. Davey, purchaser*, under the 9th section of 37 & 38 Vict. c. 78, V. C. Hall decided that the vendor was bound to answer the purchaser's inquiry "whether the vendor is or her solicitors are aware of any judgments, settlements, mortgages, charges, or incumbrances of any description affecting the property not disclosed by the abstract of the vendor's title." But the V. C. added that he "must not be considered as altogether approving of the requisition being made in the form above-mentioned. The answer might lead to the disclosure of what the pur-

chaser would rather not know. The requisition should, he thought, be added to, thus, 'and which, if remaining undisclosed might prejudicially affect the purchaser,' " *March*, 1875. [But this view has since been overruled by the Court of Appeal in the case of *Re Ford and Hill*, 10 Ch. D. 385, where it was held that the purchaser was not entitled to make any such requisition at all.]

(b) 12 Sim. 542.

(c) 1 Ph. 717; see *Stroughill v. Anstey*, 1 De G. M. & G. 653; *Mather v. Norton*, 16 Jur. 309; [*Re Tanqueray-Willauve and Landau*, 20 Ch. D. 465.]

thereby become responsible. But assuming that the facts relied upon in this case amount to notice that the debts had been paid; yet, as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this: If authority is given to sell for the payment of debts and legacies, and the purchaser *knows that the debts are paid*, is he bound to see to the application of the purchase-money? I apprehend not."

[*460] *Lord St. Leonards, with reference to the same important case, observed, "When a testator by his will charges his debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is, by implication, a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. *That intention does not cease because there are no debts.* If a trust be created for payment of debts and legacies, the purchaser or mortgagee should in no case (in the absence of fraud), be bound to see to the application of the money raised." And his Lordship added, "as to *Forbes v. Peacock* it is quite a mistake to suppose that that was a trust executed at a distance of twenty-five years from the time when it arose, for it was executed at the time when it did arise, which happened to be twenty-five years after the death of the testator" (a).

13. **Power of varying securities, and of investment.**—If a trustee have authority to invest the trust fund with a power of *varying securities*, but without an express power of signing receipts, it is implied from the nature of the trust that he shall sign receipts (b); and if he be authorised to *invest on security* simply without power of varying securities he can sign receipts, for he cannot prevent the borrower from pay-

(a) *Stroughill v. Anstey*, 1 De G. M. & G. 653, 654.

(b) *Locke v. Lomas*, 5 De G. & Sm. 326.

ing off the money, and who but the trustee can receive it back (c). Indeed a power of *investment* has been held to carry with it a power of *varying the securities* (d). Where, however, the trustee was directed to invest upon *security*, but *real security* was not mentioned, and he lent upon a *mortgage*, the Court did not think it so clear that the trustee could sign a receipt when the money was paid off as to compel a purchaser to take a title which depended on that question (e). The power of signing a receipt in such cases turns on the intention as collected from the instrument, and unless it contain authority to lend on a *mortgage* no power of signing a receipt when the mortgage money is paid off is implied.

14. *Power of sale and exchange.*—A power of signing receipts was held not to be implied in a power of sale and exchange (f). But in that case it was a mere power of sale and exchange and not the ordinary power inserted in settlements, accompanied with directions for laying out on another purchase with interim investment on securities.

* 15. *Charge of debts.*—The case in which a testa- [*461] tor, instead of devising the estate upon an *express trust* for payment of debts, creates a *charge* of debts upon his real estate, seems to require particular examination. It might have been a simple and useful rule to hold under such circumstances that the executor, and the executor only, as the person who has administration of the *personal* assets, should, by virtue of an implied power, sell the real estate for payment of the debts; but no such rule ever existed, and we proceed, therefore, to ascertain, as far as we can, by what principle the Court is guided.

a. *Devise to trustees with a charge of debts.*—If a testator *charge* his real estate with debts, and then *devises it to trustees* upon certain trusts, which do not provide for a sale or perhaps even negative the intention of conferring a power of sale, can the *trustees* give a good title to a purchaser? It is clear that [subject to the restrictions arising under the

(c) *Wood v. Harman*, 5 Mad. 368.

(e) *Hanson v. Beverly*, Sugd.

(d) *Re Cooper's Trust*, W. N. Vend. & P. 848, 11th edit.

1873, p. 87.

(f) *Cox v. Cox*, 1 K. & J. 251.

Settled Land Act, which will be subsequently discussed (*a*),] the trustees and the executor together can sell (*b*), and the question is, upon what principle this proceeds. Is the *executor* the vendor, and if so, has he a *legal* power which enables him to pass the estate at law independently of the trustee? V. C. (late L. J.) Knight Bruce seemed, on one occasion, to think that the cases of *Shaw v. Borrer* and *Ball v. Harris* might have been decided on this footing (*c*), and some recent cases lean in the same direction (*d*). But the notion of the executor passing the legal estate in such a case was never suggested until the last few years, and what was said by the Court of Exchequer in *Doe v. Hughes* was at least true at the time it was spoken, viz., that not a single case could be produced in which a mere charge had been held to give the executors a legal power (*e*). Have the executors [*462] * then an *equitable* power, and is the trustee who has the legal estate bound to convey it as the executor directs? This doctrine would be a very rational one, but there is no trace of it in the cases themselves. Apparently they were decided on the familiar principle that in a Court of Equity there is no difference between a charge of debts and a trust for payment of debts (*a*), and that the trustees

[(*a*) *Post*, p. 470.]

(*b*) *Shaw v. Borrer*, 1 Keen, 559; *Ball v. Harris*, 8 Sim. 485; S. C. 4 M. & Cr. 264; *Page v. Adam*, 4 Beav. 269; and see *Forbes v. Peacock*, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; 1 Ph. 717; *Sabin v. Heape*, 27 Beav. 553; *Corser v. Cartwright*, 7 L. R. H. L. 731. In *Shaw v. Borrer*, the trustees and executors were co-plaintiffs, and the prayer of the bill was, that the purchase-money might be paid to the executors. This, if done, by the order of the Court, would indemnify the trustees; but it did not follow that the trustees, on the completion of the sale *out of Court*, could have allowed the executors to receive the money. The question to whom the money should be paid was not adverted to in the argument, nor does it appear to whom it was paid.

(*c*) *Gosling v. Carter*, 1 Coll. 649.

(*d*) See *Robinson v. Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Eidsforth v. Armstead*, 2 K. & J. 333; *Wrigley v. Sykes*, 21 Beav. 337; *Storrey v. Walsh*, 18 Beav. 568; *Collyer v. Finch*, 5 H. L. Ca. 905; *Hodkinson v. Quinn*, 1 J. & H. 310; *Greetham v. Colton*, 34 Beav. 615.

(*e*) *Doe v. Hughes*, 6 Exch. 231. [See *Re Tanqueray-Willlaume and Landau*, 20 Ch. D. 476, where it was regarded as settled law, that a charge alone would not enable the executors to pass the legal estate.]

(*a*) *Elliott v. Merryman*, Barn. 81; *Ex parte Turner*, 9 Mod. 418; *Jenkins v. Hiles*, 6 Ves. 654, note (*a*); *Bailey v. Ekins*, 7 Ves. 323; *Ball v. Harris*, 4 M. & Cr. 267; *Wood v. White*, 4 M. & Cr. 482; *Commissioners of Donations v. Wybrants*, 2 Jon. & Lat. 197.

therefore took the legal estate upon the trusts of the will, the first of which was to pay the testator's debts. It is certainly not a little remarkable that after an examination of all the authorities upon the subject, there does not appear to be one in which the trustee has sold alone, without the concurrence of the executor. This circumstance may be easily accounted for, as trustees of the will are almost invariably appointed executors also, and where that is not the case, the purchaser naturally requires the concurrence of the executor, not on the ground that he is the vendor, but to satisfy the purchaser that the sale of the real estate is *bonâ fide* from the insufficiency of the personal assets. In some of the cases the Court has noticed, but not laid any stress upon, the circumstance of the personal representative concurring (*b*), or of the characters of trustee and personal representative being combined; but in others that fact has been passed over in silence as a mere accident, and the Court has relied on the general doctrine that a trustee of the estate charged with debts could sell and sign a valid discharge for the purchase-money (*c*). In *Doe v. Hughes* (*d*), the case most adverse to the powers arising from a charge of debts, it was admitted that by a devise to *trustees* of the real estate, subject to a charge of debts, the trustees had thereby imposed upon them the duty of raising the money to pay the debts, and this was the opinion of Lord Hardwicke, as expressed in a case which we do not remember to have seen cited. In *Ex parte Turner* (*e*), where the estate had been given subject to debts, but no express trust was created for * the [*463] purpose, he observed, "Where a devise is general

(*b*) See *Shaw v. Borrer*, 1 Keen, 559; *Forbes v. Peacock*, 12 Sim. 537; and see V. C. Knight Bruce's remarks upon *Shaw v. Borrer*, and *Ball v. Harris*, in *Gosling v. Carter*, 1 Coll. 649. But in *Ball v. Harris*, the V. C. of England observed, "It is manifest that Harris (the trustee), who had the legal fee was competent to mortgage that estate to any person who would advance money for the benefit of the testator's estate," 8 Sim. 497;

and it is equally clear that Lord Cottenham was of opinion that Harris was a trustee for payment of debts, 4 M. & Cr. 267.

(*c*) See *Ball v. Harris*, at the passages referred to in the preceding note; *Forbes v. Peacock*, 12 Sim. 546.

(*d*) 6 Exch. 231.

(*e*) 9 Mod. 418; and see *Colyer v. Finch*, 5 H. L. Cas. 922.

'in trust' or 'subject to pay debts,' the *devisee* may sell or mortgage, but *he* must pay the money to the creditors of his devisor; but if he do not, the mortgagee is not to suffer, for in cases of these general devises he is not obliged to see to the application of the money he advances. But even in this case inconveniences often arise, for where the estate is equitable assets, as it is where it is accompanied with a trust, the creditors who have not specific liens upon the land ought to come in equally, and *pari passu*. However, if the *trustee* prefer one creditor to another, where he ought not, the remedy usually is against the trustee, and not the lender of the money, for if the latter was to see to the application of his money upon so general a trust, he could not safely advance his money without a decree in this Court."

If the trustees of an estate charged with debts can, by virtue not of the express trust but of the trust implied by the charge, sell the estate, and sign a receipt for the purchase-money, it would seem to follow that they cannot allow the proceeds to be paid to the *executor* as not being the proper hand to receive (*a*), the executor in that character having no privity with the real estate. The necessity of requiring the concurrence of the personal representative would often lead to practical inconvenience, for on the death of the executor intestate there would be no personal representative of the testator, and the personal assets having been exhausted, there would be no fund for taking out letters of administration; not to mention that, should the executor be held to have any concern with the proceeds of the real estate, by virtue of the *will*, the administrator, not being appointed by the will, would not succeed to the power of the executor, which should be borne in mind as of some importance in considering whether the sale is substantially that of the executor or of the trustee who takes subject to the charge.

Should the neat point ever call for a decision, it will

(a) See *Gosling v. Carter*, 1 Coll. 650, where V. C. Knight Bruce says, "If payment ought to be made to one, it is not, necessarily, a good payment to make that payment to one and another."

probably be held that the trustee, without the concurrence of the executor, can give a good title (*b*).

Lord St. Leonards' Act. — By Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 14) where by a will coming into operation after 13th August, 1859, a testator * charges [*464] real estate with the payment of *debts*, or any *specific legacy or sum*, and devises the estate so charged to *trustees* for the whole of his estate or interest, and makes no express provision for raising the debts, legacy, or sum, the *devises in trust* may sell or mortgage; and by s. 15, the power is continued to all persons taking the estate so charged by survivorship, descent, or devise; and by s. 17, purchasers and mortgagees are not bound to inquire whether such powers "have been duly and correctly exercised by the person or persons acting in virtue thereof." Where *debts* are charged, of course a purchaser or mortgagee under these powers is not bound to see to the application of his money, and where a *specific legacy or sum* is charged, if the above enactments do not *per se* confer a power of signing receipts, the purchaser or mortgagee is exempted from seeing to the application by the 23d section of the same Act (*a*).

The 18th section declares that the Act shall "not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest, charged with debts or legacies, nor shall it affect the power of any such devisee or devisees to sell or mortgage *as he or they may by law now do*." To make this section consistent with the 14th, the "devise" referred to in the 18th section must mean a *beneficial devise*, and "devisee or devisees" a *beneficial devisee or devisees*, and the inference would seem to be that, in the view of the framer of the Act, no legislative assistance was needed in the case of a beneficial devise subject to a charge. Indeed the concluding words of the section seem almost tantamount to a declaration of the legislature that beneficial devisees sub-

(*b*) The recent case of *Hodkinson v. Quinn*, 1 J. & H. 303, when closely considered, will be found to afford little aid towards solving this ques-

tion; and see *Cook v. Dawson*, 29 Beav. 126; 3 De G. F. & J. 127.

[(*a*) See also 44 & 45 Vict. c. 41, s. 36.]

ject to a charge have power to sell or mortgage, which is the case we next proceed to consider.

β. Devise to a person beneficially with a charge of debts. — If a testator charge his debts and devise the estate subject to the charge to *A. and his heirs* not upon trust but *for his own use*, can the beneficiary in this case make a good title? The answer to the question last discussed is an answer also to this, for if where the express trust negatives the intention of conferring a power to sell the trustee can still make a good title, it is evident that he can only do so by virtue of the charge. Any distinction between the two cases would be in favour of the beneficial devisee, for if the trustee in defiance of the express trust can sell, *à fortiori* the devisee can, who is fettered by no such restriction. In both instances the charge operates as a trust for payment of debts, and is attended with all the same consequences. "A [*465] charge," said Lord *Eldon, "is in substance and effect *pro tanto* a devise of the estate upon trust to pay the debts" (a), and "this," observed Lord St. Leonards, on citing the dictum, "is supported by the current of authorities" (b). It is clear that the devisee can, where he also fills the character of executor, make a good title (c), and in some of the cases the Court did not in terms rely on the characters being combined (d), but it is singular that no authority can be found in which the question whether the devisee alone can make a good title has arisen.

In the Court of Exchequer (e) it was said that in a devise to *trustees*, subject to a charge of debts, the trustees could sell; but that a charge in the hands of a *devisee* if the lands were devised, or in the hands of the *heir-at-law* if the lands descended, was a charge only in equity. The Court was there considering, more particularly, the question of *legal*

(a) *Bailey v. Ekins*, 7 Ves. 323.

(b) *Commissioners of Donations v. Wybrants*, 2 Jon. & Lat. 198.

(c) *Elton v. Harrison*, 2 Sw. 276, note; *Elliot v. Merryman*, Barn. 78; *Dolton v. Young*, 6 Madd. 9; *Johnson v. Kennett*, 6 Sim. 384; 3 M. & K. 624; *Eland v. Eland*, 1 Beav. 235, 4 M. & Cr. 420; *Page v. Adam*, 4 Beav.

269; *Corser v. Cartwright*, 8 L. R. Ch. App. 971; affirmed by H. L. 7 L. R. H. L. 781.

(d) *Elliot v. Merryman*, *Dolton v. Young*, *Johnson v. Kennett*, *Eland v. Eland*, *ubi supra*; *Colyer v. Finch*, 5 H. L. Ca. 905, 922.

(e) *Doe v. Hughes*, 6 Exch. 231.

powers; but if it was intended to be said that a devisee, subject to a charge, could not sell and sign a receipt for the money, the doctrine is inconsistent with the nature of a charge of debts in equity as commonly understood. The prevalent opinion hitherto is believed to have been that a devisee subject to debts can sign a receipt for the purchase-money (*f*), and the cases in which the Court has upheld purchases from a devisee with the concurrence of the executor but without relying upon such concurrence, would be a trap for purchasers should the Court now refuse to uphold a purchase from a devisee only. Considering the declaratory words contained at the end of the 18th section of Lord St. Leonards' Act, it may now, it is conceived, be safely assumed that a purchaser from a devisee subject to a charge of debts, will without the concurrence of the executor acquire a good title.

γ. *Charge of debts where there is no devise of the estate.* —

If a testator charge his debts on the real estate, and *does not devise the estate at all*, but allows it to descend to the *heir*, can the heir sell and sign a receipt for the purchase-money? It appears to be clear that he cannot, for he takes nothing under the will, and cannot therefore be regarded as a person constituted by the * testator a trustee by [*466] implication for payment of debts (*a*); he can pass the legal estate, but he could not sign the receipt; *i.e.*, if the heir misapplied the money the creditors might still come upon the estate.

But in this case, if the heir is disabled from selling can the *executor* sell (*i.e.*, independently of Lord St. Leonards' Act, to be mentioned presently), for otherwise the charge of debts amounts to a direction for a Chancery suit? (*b*). The legal question arose in *Doe v. Hughes* (*c*) before the Court of Exchequer, and the Court held that *a charge had*

(*f*) See the cases cited in note (*a*), p. 462, *supra*.

(*a*) See *Goeling v. Carter*, 1 Coll. 650 (where the V. C. said that the intention to be collected was, that the heir-at-law should have nothing to do with it); *Robson v. Flight*, 34 Beav.

110, 5 N. R. 344; S. C. on appeal, 4 De G. J. & S. 608; *Doe v. Hughes*, 6 Exch. 281; *Forbes v. Peacock*, 11 M. & W. 637, 638.

(*b*) See *Robinson v. Lowater*, 5 De G. M. & G. 275.

(*c*) 6 Exch. 223.

no operation at law but must be enforced in equity. This decision has been found much fault with. The Master of the Rolls said that before the case in the Exchequer he had considered the law to be that a charge of debts gave the *executors* an implied power of sale (*d*); for otherwise, it is argued, in the case of a charge where the estate descends, there can be no sale without the aid of the Court. But this does not appear to follow. If a testator *expressly direct that his estate shall be sold* (without naming the person), and the fund is to be distributed in a way in which the executors alone can distribute it, a power of sale is given to the executors by implication over the legal estate even in Courts of law (*e*). By analogy to this, where there is no direction to sell, but only a charge of debts, this last, though an *umbra* in a Court of law, creates an *equitable* power of sale or mortgage in the view of a Court of Equity — *i.e.*, the executor may contract for the sale, and on the acceptance of the title by the purchaser, the person in whom the legal estate is vested will, as being a trustee for the executor, be compellable to convey as the executor directs, and if he refuses, the legal estate may be vested in the purchaser by the aid of the Trustee Acts (*f*). In *Gosling v. Carter* (*g*), Vice-Chancellor Knight Bruce declined to give an opinion whether a mere charge of debts gave to the executors a power of sale either at law or in equity, but would not compel a purchaser to take the title from the *executor without the concurrence of the heir-at-law. In *Robinson v. Lowwater* (*a*) the legal estate was already in the purchaser, so that the legal question did not arise, but it was held that the executors had given the purchaser a good title. In *Eidsforth v. Armstead* (*b*), Vice-Chancellor Wood professed

(*d*) *Robinson v. Lowwater*, 17 Beav. 601; and see *Wrigley v. Sykes*, 21 Beav. 337; *Storry v. Walsh*, 18 Beav. 568; *Sabin v. Heape*, 27 Beav. 553; *Hodkinson v. Quinn*, 1 J. & H. 309; *Cook v. Dawson*, 29 Beav. 123; 3 De G. F. & J. 127; *Greetham v. Colton*, 34 Beav. 615; *Hamilton v. Buckmaster*, 12 Jur. N. S. 986.

(*e*) *Forbes v. Peacock*, 11 M. & W.

630; *Tylden v. Hyde*, 2 S. & S. 238; *Bentham v. Wiltshire*, 4 Madd. 44.

(*f*) See *Re Wise*, 5 De G. & Sm. 415; *Hodkinson v. Quinn*, 1 J. & H. 303.

(*g*) 1 Coll. 650, 652.

(*a*) 17 Beav. 592; 5 De G. M. & G. 272; and see *Storry v. Walsh*, 18 Beav. 508.

(*b*) 2 K. & J. 333. It does not

to follow *Robinson v. Lowater*, and held the power of sale to be, according to the report, in the *trustees*, but which appears to be a mistake for the *executors*. The surviving trustee had devised the trust estate, and the devisee therefore could not sell, but the surviving trustee was also surviving *executor*, and appointed the devisee his *executor*, and in the character of *executor* the devisee might be thought to represent the original testator, though it seems the better opinion that even then the power of sale would not pass to him (c). In *Wrigley v. Sykes* (d), the Master of the Rolls decided that the executors could contract for the sale of the estate, but guarded himself by saying that the Court, as far as it could, would certainly secure to the purchaser a good legal estate when the conveyance was made. It is conceived that *Doe v. Hughes* was a perfectly sound decision upon the legal question, but that the executors have an *equitable power of sale*, and consequently that the holder of the legal estate is a trustee for them (e). [This power of sale is implied because the executors are appointed by the testator to pay his debts, but such a power has never been implied in an administrator who is not appointed by the testator, but is the officer of the Probate Court (f).]

Lord St. Leonards' Act.—By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 16, as to wills taking effect since 13th August, 1859, where a testator *charges* his debts or any *legacy* or *specific sum*, and has *not devised the estate to a trustee or trustees*, the *executor* for the time being may sell or mortgage (g); and by the 23d section, the purchaser or

appear how the purchaser had got or was to get the legal estate, whether from the executor, as having a legal power, or from the trustee, on the construction that the legal fee simple vested in the trustee under the will, or from the trustee, as having the legal estate during the life of H. Toulmin, with the concurrence of H. Toulmin, as having the legal estate in remainder, so as to extinguish his power of appointing by will. The case loses much of its force from the amicable manner

in which the point was submitted to the Court.

(c) See Sugd. Powers, 129, 8th ed.

(d) 21 Beav. 337; and see Colyer v. Finch, 5 H. L. Cas. 922; Cook v. Dawson, 29 Beav. 123; Greetham v. Colton, 34 Beav. 615.

[(e) See Tanqueray-Willauwe and Landau, 20 Ch. D. 465.]

[(f) *Re Clay and Tetley*, 16 Ch. D. 3.]

[(g) Where one executor has renounced probate, the acting executors

[*468] mortgagee * is not bound to see to the application of the money, and it would seem that the executor is thus empowered to pass the *legal* as well as the *equitable* estate, for the clause proceeds that "any sale or mortgage under the Act shall operate only on the estate and interest, whether *legal* or *equitable*, of the testator, and shall not render it unnecessary to get in any *outstanding* subsisting legal estate." It must not escape notice that the power of sale is confined to the *executor*, the person whom the testator himself trusted, and is not extended to an *administrator (a)*.

δ. *Charge of debts where the estate lapses.*—Should a testator charge his debts on the real estate, and then devise the estate to A. and his heirs beneficially, and the *devisee dies in the testator's lifetime*, so that the estate descends, can the heir in this case sell and sign receipt? If the heir cannot sell where the estate was never devised, but left to descend, *à fortiori* he cannot in this case, for here not only the heir is not invested with the character of trustee under the will, but the estate, subject to the charge, was devised to another person, who was therefore intended to execute the implied trust. The machinery contemplated by the testator failed by the act of God, and no alternative remains but that the trusts should be executed by the Court (*b*). It is presumed that under these circumstances it could not be held that the executors have by the will even an *equitable* power of sale. The devisee, had he lived, would have been the proper person to execute the trust, and a power of sale cannot belong

or executor for the time being may exercise the powers of this section, notwithstanding the will contains an express direction that the property shall be sold by the executors, *Re Fisher and Haslett*, 13 L. R. Ir. 546.]

[(a) *Re Clay and Tetley*, 16 Ch. D. 3.]

(b) But see *Hardwick v. Mynd*, 1 Anst. 109; *Austin v. Martin*, 29 Beav. 523. The latter case may possibly be supported on the ground that the mortgagee, who had a power of sale

and of signing receipts, was a party to the conveyance; but the reasoning of M. R., if correctly reported, is not satisfactory. How can it be said, for instance, that "the whole of the beneficial interest was vested in T. F. Stephens either in his character of heir-at-law or in his character of *legal personal representative*?" What beneficial interest in a testator's *freehold* estate can vest in his *personal representative*?

to the executors, as the testator could not be taken to have contemplated his own intestacy as to real estate.

Lord St. Leonards' Act. — However, by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 16 & 23, as to wills coming into operation since 18th August, 1859, the executor may sell or mortgage and sign a receipt for the money.

c. Charge of debts where the estate is subjected to various limitations. — Suppose a testator to charge his debts, and to devise the estate to *A. for life, with contingent remainders or other limitations*, which render it impossible that the implied power of sale can be executed by the devisees. This has occurred in several cases (*c*), and the *result [*469] appears to be that the Court, if it can possibly avoid it, will not construe the charge as a direction for a Chancery suit, but will assume that a power of sale for payment of the debts was given to some one, and that as it was not given to the devisees it must have been intended for the executors. In such a case the executors must be considered as having an *equitable* power of sale. The case in the Exchequer (*a*) directly decided that the executors have no power themselves to pass the *legal* estate. Where, in the case supposed, the executors take an implied equitable power of sale upon the face of the will, it is immaterial whether the devised estates do or not lapse, except that the legal estate will, as the event happens, be in the devisees or in the heir-at-law. If a conveyance cannot be obtained, recourse must be had to the Trustee Acts for the transfer of the legal estate.

Lord St. Leonards' Act. — However, Lord St. Leonards' Act, 22 & 23 Vict. c. 35, appears to apply to such a case, for though the devise is not to trustees as required by the 14th section, yet it is a case within the 16th section, where "the whole estate and interest" of the testator "has not become vested in any trustee or trustees;" and it is presumed that the 18th section was meant to except from the Act devises

(*c*) Gosling v. Carter, 1 Coll. 644; 592; 5 De G. M. & G. 272; Sabin v. Eidsforth v. Armstead, 2 K. & J. 333; Heape, 27 Beav. 563; Greetham v. Wrigley v. Sykes, 21 Beav. 337; Colton, 34 Beav. 615; Hooper v. Strutton, 12 W. R. 367.
Bolton v. Stannard, 4 Jur. N. S. 576; and see Robinson v. Lowater, 17 Beav. (a) Doe v. Hughes, 6 Exch. 223.

to a person or body of persons taking the *fee-simple or fee-tail in præsentī free from executory limitations over*, and not devises of the fee-simple to several persons in succession for particular estates.

True principle. — The true principle which, independently of the Act referred to, ought to govern these cases would appear to be, that where a testator devises the estate to trustees, or to a beneficiary, and charges his debts, there the trustees or the beneficiary should have a power of sale and signing receipts, but that where a testator charges his debts, and does not devise the estate, or devises it in such a manner that there is no one who can execute the trust, there the executors should have an equitable power of sale and signing receipts, and that the depositaries of the legal estate should be trustees for them, and bound to convey as they direct; but that where the testator has devised the estate, and therefore provided a hand to execute the trust, but the trustee or devisee dies in the testator's lifetime, there, as the hand to execute the trust has only failed by the act of God, no person has a power of sale or signing receipts, but the trust can only be executed by the Court.

[*470] *16. **Storry v. Walsh.** — It remains to notice in connection with this subject the case of *Storry v. Walsh (a)*, in which Sir J. Romilly, M. R. held in substance that a devisee, subject to a charge of debts and legacies, may, with the concurrence of the *executors* declaring that all debts and legacies have been paid, *sell for his own private purposes*, and give a good title to a purchaser. This case resembles that of an executor, who is also specific or residuary legatee, selling a chattel interest for his own private debt (*b*).

[17. **Effect of Settled Land Act.** — Before quitting this subject, however, it will be proper to advert to the question whether the power of selling or mortgaging the property which arises under a charge of debts is affected by s. 56 of the Settled Land Act, 1882. That Act after giving large powers to the tenant for life, including a general power of sale, and a power of mortgaging for specific purposes, which

(a) 18 Beav. 559; and see *Howard v. Chaffers*, 2 Dr. & Sm. 236.

(b) See *infra*, as to receipts of executors, p. 479.

do not include the payment of incumbrances on the settled property, and providing by s. 56, sub-s. 1, that powers given by the settlement to trustees are not to be prejudicially affected by the Act, enacts in sub-s. 2, that "the consent of the tenant for life shall, by virtue of the Act be necessary to the exercise by the trustees of the settlement or other persons of any power conferred by the settlement exercisable for any purpose provided for in the Act," and the question is whether this makes the consent of the tenant for life necessary to the exercise by the trustees of a power of selling or mortgaging arising under a charge of debts. Now in the first place it seems clear that, as the only power of mortgaging given by the Act is of a very limited nature, and for purposes wholly dissimilar from those for which the power under the charge of debts is exercisable, the trustees' power of *mortgaging* is unaffected by sub-s. 2, and may be exercised without the concurrence of the tenant for life. With reference to the power of *sale*, there is more difficulty, as the tenant for life has a general power of selling, and under s. 21, the proceeds of the sale may be applied in discharging the incumbrances affecting the inheritance of the settled land. The sale of the settled property or a part thereof for the purpose of paying off the incumbrances seems, therefore, to be strictly a "purpose provided for in the Act," and it is difficult construing the Act fairly to avoid the conclusion that the trustees cannot sell without the consent of the tenant for life. The result of this construction of the Act is without doubt inconvenient, and the view that the power of sale arising under a charge of debts is unaffected by the 56th section is supported by *weighty opin- [*471] ions (a), but until that view has received the sanction of the Court a purchaser could not be safely advised to accept a title from the trustees without the consent of the tenant for life (b).]

18. **Who must sign the receipt.** — As the trust for sale is a

[(a) See Wolstenholme and Turner's Settled Land Act, 2d Ed. p. 70.]

[(b) As to the meaning of the term "tenant for life," and the limited

owners who have the powers of a tenant for life, see sects. 2, 58 and 62; and see also *post*, chap. xxiii. s. 2, v.]

joint office, the receipt must be signed by *all the trustees* who have undertaken to act. And where a *power* is given to trustees to discharge the purchaser from seeing to the application of his purchase-money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustees; for the transfer of the estate at law carries not along with it the confidence in equity (*c*). But the receipt need not be signed by a trustee who has *disclaimed*, for by the effect of disclaimer the acting trustees are put exactly in the same plight as if the renouncing trustee had never been mentioned (*d*).

19. **Power to sign receipts in one, and delegation to another.** — As a trust cannot be *delegated*, it follows that if A. and B. be trustees for payment of debts, and they convey the estate to C. upon the like trusts, the purchaser could not safely pay his purchase-money upon the receipt of C. In *Hardwick v. Mynd* (*e*) the executors and trustees renounced probate, and (probably with the intention of disclaiming) conveyed the estate to C., the heir-at-law; and certain mortgages made by C. were upheld. It might have been argued that as the trustees, by disclaiming, vested the estate in the heir, he was properly the trustee to sell or mortgage. It would be difficult, however, to maintain that the heir under such circumstances could sign a receipt, and certainly the Court did not put it upon that ground, but said that the mortgages if made by the trustees would have been good, and that they were in fact made by them, as they had deputed C. to act for them in the trust. Such a doctrine, however, at the present day could not be sustained.

20. **Power of signing receipts, as regards trustees appointed by the Court.** — As a general rule, where a special *discretionary* or *arbitrary* power was given to trustees, and the settlement contained no proviso for the appointment of new trustees with similar powers, it was not competent for the Court, [prior to the recent Acts,] on the substitution of new

(c) *Créwe v. Dicken*, 4 Ves. 97.

(e) 1 Anst. 109; and see Lord

(d) *Adams v. Taunton*, 5 Mad. 435; *Hawkins v. Kemp*, 8 East, 410; *Smith v. Wheeler*, 1 Vent. 128.

Braybroke v. Inskip, 8 Ves. 432.

trustees by its own inherent jurisdiction, to invest such trustees with that arbitrary power. But in a trust for *sale an authority to sign receipts is not a mere [*472] power, but enters into the substance of the trust; that is, it is so interwoven with the trust itself that there can be no execution of the trust without the accession of the power; and in such cases the appointment of new trustees by the Court may be taken to have included the power. Thus, suppose A. and B. are trustees of an estate to sell for payment of debts, and on the death of A. and B. the Court appoints C. and D. upon the like trusts; if C. and D. cannot sign receipts, they cannot sell, and their appointment as trustees is nugatory (a). [But now, by recent Acts (b), trustees appointed by the Court have "the same powers, authorities, and discretions, and may in all respects act" as if originally appointed by the instrument creating the trust.]

21. *Receipt after a breach of trust.* — It sometimes happens that the trustees *had* clearly at first a power of signing receipts, but subsequently, by a *breach of trust* or some irregularity in the administration of the estate, the fund has got out of its proper channel, and then the question arises, whether, if the person who ought never to have had possession of the fund intend to restore it to its proper state, the trustees can sign a receipt. It may be said that as the power never contemplated a breach of trust, it would not be safe to consider the exercise of the power as an indemnity, if the money cannot be properly paid to the trustees upon any other ground: on the other hand, if the fund be reinstated *in specie*, so that it is standing in the exact form in which the trust required it, and in the names of the persons whom the settlement appointed the trustees, how can it be said that in such a state of things any liability can remain? (c).

(a) See *Drayson v. Pocock*, 4 Sim. 283; *Byam v. Byam*, 19 Beav. 58; *Bartley v. Bartley*, 3 Drew. 385; *Lord v. Bunn*, 2 Y. & C. C. C. 98. As to the powers generally of trustees appointed by the Court, see *post*, ch. xxiii. s. 2.

[(b) 23 & 24 Vict. c. 145, s. 27;

since repealed and its place supplied by 44 & 45 Vict. c. 41, s. 33; and see *post*, ch. xxiii. s. 2.]

(c) See *Lander v. Weston*, 3 Drew. 389; *Hanson v. Beverley*, Sugd. Vend. & Purch. 848, 11th ed. In *Carver v. Richards*, A. & B. were trustees of Mrs. Warren's settlement, dated 31st

[*473] *22. **Sale where no money is to be received by the trustees.** — Where the trust estate is *in mortgage*, and the money receivable by the trustees is applicable either wholly or in part in payment of the mortgage, of course the trustees may sell and sign a receipt for the difference, or, if there be no surplus beyond the mortgage, may sell without signing any receipt; for the circumstances to which the receipt clause was meant to apply, have, in one case, arisen only partially, and in the other not at all.

23. **Hope v. Liddell.** — Where the trustees have a power of signing receipts, it has been held not to be necessary that the trustees, who sign the receipts, should themselves actually receive the money, provided it be paid to some person by their direction, and the transaction do not on the face of it imply a breach of trust (*a*). Thus, where the purchase-money was expressed in the deed to be paid to the trustee, and a receipt by the trustees was endorsed, but in fact the money was paid, by the direction of the trustee, to the tenant for life; Lord Romilly, M. R., said, that the purchaser

May, 1825, which contained a power of investing the trust fund on a mortgage of lands of *inheritance in fee simple*, with the usual receipt clause. On 27 July, 1826, the trustees invested 1200*l.* on a mortgage of a *term of 500 years*. On 23 November, 1844, the owner of the fee subject to the term paid the 1200*l.* to A. and B. who assigned the term to attend, and the receipt of A. and B., notwithstanding the breach of trust, was held to be sufficient. M. R. 10 December, 1859. The defendants appealed from the decree upon other points, and also included this, but wanted the courage to argue it at the hearing. It not unfrequently happens that trustees without any sufficient power lay out trust money in the purchase of real estate, and then the question arises whether when they want to sell again they can make a good title. The case may be provided for by a special condition of sale or the sanction of the Court may be obtained in a suit

for the purpose; see *Robinson v. Robinson*, 10 Ir. Rep. Eq. 189. [But it has been held in a recent case that upon the purchase-money being invested by the trustees on the securities authorised by the instrument creating the trust, and on one of the *cestuis que trust* concurring in the sale to show that they had not all elected to take the real estate as realty, the purchasers will have a good title from the trustees; *Re Patten and Guardians of the Edmonton Union*, 52 L. J. N. S. Ch. 877.]

[(*a*) In *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, Kay, J., seems to have been of opinion that such a transaction necessarily implied a breach of trust; but see *ante*, p. 292. However, in the present state of the authorities no trustee can be advised to allow his co-trustee to receive trust money unless the circumstances of the case render it *necessary*.]

was bound to pay the money as the trustee directed (*b*), and having obeyed that direction was exonerated from the consequences. Various transactions might have occurred between the trustee and *cestuis que trust* (such as the execution of a previous mortgage on sufficient security), which would make such a payment perfectly legitimate (*c*). The Court in this case was protecting a *bond fide* purchaser, and the principle here laid down must be applied with great caution. A purchaser who has paid his money to another by the direction of the trustee may be protected under the special circumstances of the case, but no purchaser who has the money still in his pocket can be advised to pay it to any other than the trustee * or his duly authorised agent (*a*); [and in [*474] the present state of the authorities the most prudent course is to pay it to the trustee *personally*, and if there are more trustees than one to pay it in the presence of all the trustees, or else to pay it into a bank to their joint account (*b*).]

24. Receipts for money extraneous to trust. — A power of signing receipts in a settlement will extend only to what the trustees are by the settlement authorised to receive (*c*).

25. Feme covert. — When one of the trustees is a *married woman*, the questions arise, can she by virtue of the power sign a receipt without the concurrence of her husband, who is answerable for her acts; and ought the money to be paid to herself, or to her husband who on the one hand is answerable for her acts, but on the other hand is not the person pointed out by the settlement as the hand to receive it? It would appear on principle that the money cannot be paid to

[(*b*) But see as to this *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, where it was held that the purchaser could not be compelled to pay to the nominee of the trustees or even to one of the trustees by the direction of the others, and see *ante*, pp. 447, 448.]

(*c*) *Hope v. Liddell*, 21 Beav. 202, 203; and see *Locke v. Lomas*, 5 De G. & Sm. 326; *M'Carogher v. Whiel-*

don, 34 Beav. 107; [*Ferrier v. Ferrier*, 11 L. R. Ir. 56;] but see *Pell v. De Winton*, 2 De G. & J. 13.

(*a*) [*Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592; and] see *Re Fishbourne*, 9 Ir. Eq. Rep. 340; and *ante*, pp. 447, 448.

[(*b*) See *ante*, pp. 447, 448.]

(*c*) *Pell v. De Winton*, 2 De G. & J. 20, *per Cur.*

the husband, who is a stranger, and the safest course would be to pay the money into some responsible bank in the joint names of the trustees (excluding the husband), and to take a written receipt from the trustees, to be also signed by the husband as sanctioning the receipt by the wife (*d*). [The concurrence of the husband may however be dispensed with if he has abjured the realm or is an outlaw (*e*), and where a married woman who is a trustee sues under Order 16, Rule 16, without her husband, she can give a good discharge for the money recovered under the judgment without his concurrence (*f*). And where the marriage has taken place since the 31st December, 1882, or the trust has been undertaken by the married woman since that date, she can sign a receipt for the money, without the concurrence of her husband who is not answerable for her acts unless he intermeddled in the trust (*g*).]

26. **Solicitor receiving purchase-money.**— If the trustees of an estate bound by a contract for sale of a date prior to the trust deed execute a conveyance to the purchaser and sign a receipt indorsed, and leave the deed in the hands of the solicitor of the settlor who had contracted to sell, and the solicitor completes the sale and receives the purchase-money and misapplies it, the trustees are personally liable to [*475] the *cestuis que * trust*, as having improperly enabled the solicitor of a third person to get possession of the fund (*a*).

27. **Practical directions where no power to sign receipts.**— The following observations of Lord St. Leonards upon the subject of trustees' receipts, deserve every attention. "Where," he says, "a purchaser is bound to see the money applied according to the trust, and the trust is for payment of *debts or legacies*, he must see the money actually paid to the creditors or legatees. In cases of this nature, therefore,

[(*d*) See *Kingsman v. Kingsman*, 6 Q. B. D. 122, 128, 131.]

[(*e*) *Per* Lord Selborne, L. C., *Kingsman v. Kingsman*, 6 Q. B. D. 122, 128.]

[(*f*) *Kingsman v. Kingsman*, *ubi supra*.]

[(*g*) 45 & 46 Vict. c. 75, ss. 1, 2, 5, 24; see *ante*, p. 36.]

(*a*) *Ghost v. Waller*, 9 Beav. 497; and see *Wood v. Weightman*, 13 L. R. Eq. 434; *West v. Jones*, 1 Sim. N. S. 206.

each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one; or if the creditors or legatees are but few they may be made parties to the conveyance. Another mode by which the purchaser may be secured is an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges, and then the trustee can be made a party to the several conveyances. Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into Court; and this is the surest mode, because the money will not be paid out of Court without the knowledge of the purchaser" (b).

28. **New principle suggested.** — From the preceding discussion the fundamental principle may be collected, that (where no Act of Parliament applies (c)) *a purchaser is in all cases bound to see to the application of his purchase-money, unless a positive intention to the contrary on the part of the settlor be either expressed or implied in the instrument creating the trust.* Such indeed is the conclusion to which the authorities conduct us; but, independently of precedent, it might be suggested that the better principle would be, that, *prima facie, a direction to sell should imply in all cases a power of signing discharges; but that where it was practicable, and no impediment to the execution of the trust was thereby created, the purchaser should pay his money directly to the party beneficially entitled.* The distinction between the two principles is very material. According to the former rule, if a trust be created for payment of debts and legacies, and the debts be paid, and then the trustees sell, though the purchaser has notice of all debts having been discharged, he is nevertheless not bound to see to the application of his purchase-money, because there was an implied intention by the settlor that the receipts of trustees should be sufficient acquittances (d); but, by the operation * of the latter rule, the purchaser [*476]

(b) Vend. & Purch. 848, 11th edit. 23 & 24 Vict. c. 145, s. 29; [44 & 45

(c) See 22 & 23 Vict. c. 35, s. 23; Vict. c. 41, s. 36,] referred to ante.

(d) See *supra*, pp. 458 et seq.

would be bound, for the necessity of his paying the money immediately to the legatees would not, if they were of age, prevent the completion of the sale, and therefore there is no reason why the purchaser should be exempted from seeing to the application.

Cestui que trust abroad. — Again, suppose a trust for sale, with a direction to distribute the proceeds between A., B., and C., and that, after the date of the instrument, C. quits the country or cannot be found. According to the first principle, as the absence of C. was not an event in the contemplation of the settlor, and no inference can be drawn that he meant the trustees to sign receipts, it follows that the sale is rendered impossible, and the contradiction arises, that the settlor having in *express terms* directed a sale, and it being admitted that the will of the settlor is authoritative, yet the execution of that intention is intercepted by the construction of equity. "It were difficult," says Lord St. Leonards, "to maintain that the absence of a *cestui que trust* in a foreign country should, in a case of this nature, impede the sale of the estate" (a), and yet to such a result the rule in question, if there be no exception to it, would apparently lead. But according to the other principle suggested, no such obstacle arises. The receipts of the trustees would then *primâ facie* be discharges, as necessary to the execution of the sale; and as C. is not at hand, the purchaser in respect of C.'s share in the purchase-money could not be called upon to observe a rule which would interpose a bar to the accomplishment of the expressed purpose of the settlor (b).

[29. If a person is interested in property in several capacities, and in one of such capacities can give a valid discharge for the purchase-money on the sale of the property, a purchaser who has no notice of an intended misapplication by such person of the purchase-money will be discharged by his receipt (c), and it is immaterial that the conveyance does not

(a) Sugd. Vend. & Purch. 844, 11th ed.; and see *Forbes v. Peacock*, 12 Sim. 644; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342.

(b) Receipts of trustees are now in most cases made sufficient dis-

charges by Act of Parliament, see *ante*, pp. 451, 452.

[(c) *Corser v. Cartwright*, 7 L. R. H. L. 731; *West of England and South Wales District Bank v. Murch*, 23 Ch. D. 138.]

show that the vendor is selling or receiving the purchase-money in the capacity in which he is empowered to do so; and where a person was both executrix and trustee, and as such executrix and trustee had power to carry out a transaction which she purported to carry out as a trustee in which capacity she had not the power, it was held that the transaction was validly effectuated (*d*).]

*30. *Receipts of executors.*—As *executors* are to [*477] a certain extent invested with the character of trustees, it may be proper to introduce a few remarks upon their powers in disposing of the assets.¹

Power to sell or mortgage.—On the death of a testator the personal estate vests wholly in the executor, and to enable him to execute the office with facility, the law permits him, with or without the concurrence of any co-executor (*a*), to sell or even to mortgage (*b*), by actual assignment or by equitable deposit (*c*), with or without power of

[(*d*) *West of England and South Wales District Bank v. Murch*, *ubi supra*.]

(*a*) *Scott v. Tyler*, 2 Dick. 725, *per* Lord Thurlow; *Smith v. Everett*, 27 Beav. 446; *Shep. Touch*. 484; *Murrell v. Cox and Pitt*, 2 Vern. 570; *Fellows v. Mitchell*, 2 Vern. 515; *Doe v. Stace*, 15 M. & W. 623; *Dyer*, 23, a; and see *Sneesby v. Thorne*, 7 De G. M. & G. 399.

(*b*) *Bonney v. Ridgard*, 1 Cox, 145, see 148; *Scott v. Tyler*, 2 Dick. 727, *per* Lord Thurlow; *Mead v. Orrery*,

3 Atk. 240, *per* Lord Hardwicke; *Andrew v. Wrigley*, 4 B. C. C. 138, *per* Lord Alvanley; *M'Leod v. Drummond*, 17 Ves. 154, *per* Lord Eldon; *Keane v. Roberts*, 4 Mad. 357, *per* Sir J. Leach; and see *Humble v. Bill*, 2 Vern. 444; *Sanders v. Richards*, 2 Coll. 568; *Miles v. Durnford*, 2 De G. M. & G. 641.

(*c*) *Scott v. Tyler*, 2 Dick. 725, *per* Lord Thurlow; and see *M'Leod v. Drummond*, 14 Ves. 360; *S. C.* 17 Ves. 167; *Ball v. Harris*, 8 Sim. 485.

¹ *Executors' receipts.*—An executor can do alone many things which a trustee may not; *Shaw v. Spencer*, 100 Mass. 392; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559; *Petrie v. Clark*, 11 S. & R. 377. If there is a misapplication of the purchase-money, the remedy is against the executor; *Penn. Ins. Co. v. Austin*, 42 Pa. St. 257. In case of fraud by executors, the purchaser has no protection; *Wilson v. Doster*, 7 Ired. Eq. 231; *Williamson v. Bank*, 7 Ala. 906; *Williamson v. Morton*, 2 Md. Ch. 94; *Joyner v. Conyers*, 6 Jones Eq. 78; *Pendleton v. Fay*, 2 Paige, 202; *Austin v. Willson*, 21 Ind. 252; *Champlin v. Haight*, 10 Paige, 274. Although an executor gives a bond, yet he does not hold estate funds in his own right; *Atkinson v. Atkinson*, 8 Allen, 15; *Barker v. Barker*, 14 Wis. 131; neither can he receive nor receipt for funds until he has qualified; *Luscomb v. Ballard*, 5 Gray, 403.

sale (*d*), all or any part of the assets, legal or equitable (*e*); and though liable to render an account to the Court, he cannot be interrupted in the discharge of his office by any person claiming either *dehors* the will, as a creditor, or under it, as a legatee. The creditor has merely a demand against the executor personally (*f*), the *pecuniary* or *specific legatee* is not entitled to the legacy or bequest until the executor has assented (*g*), and the *residuary legatee* has no lien until the estate has been liquidated and cleared of all liabilities, both *dehors* and under the will (*h*). Upon the sale of the chattel, the purchaser is not concerned to see to the application of his purchase-money, and it need not be recited in the conveyance that the money is wanted for the discharge of liabilities (*i*): it is sufficient that the purchaser trusts him whom the testator has trusted (*j*): if there be any misapplication, the remedy of the creditor or legatee is not against the purchaser, but the executor (*k*). It is impossible for the purchaser to ascertain the necessity of the sale, for [*478] this * must depend upon the state of the accounts, which he has no means of investigating without the powers annexed only to the executorship (*a*).

Notice of the will.—Even express notice of the will, and of the bequests contained in it, works to the purchaser no prejudice; for “every person,” said Sir J. Leach, “who deals with an executor has necessarily implied if not express notice of the will: but as a purchaser of real estate devised

(*d*) *Russell v. Plaice*, 18 Beav. 21; and see p. 426, *supra*.

(*e*) *M'Leod v. Drummond*, 14 Ves. 360, *per* Sir W. Grant; *Nugent v. Gifford*, 1 Atk. 463.

(*f*) *Nugent v. Gifford*, 1 Atk. 463, *per* Lord Hardwicke; *Mead v. Orrery*, 3 Atk. 238, *per eundem*; *M'Leod v. Drummond*, 17 Ves. 163, *per* Lord Eldon.

(*g*) *Mead v. Orrery*, 3 Atk. 238, 240, *per* Lord Hardwicke. But the executor is bound to assent as soon as the funeral and testamentary expenses and debts have been paid, *Greene v. Greene*, 3 I. R. Eq. 102, *per Cur.*

(*h*) *M'Leod v. Drummond*, 17 Ves. 163, 169, *per* Lord Eldon; and see *Mead v. Orrery*, 3 Atk. 238, 240.

(*i*) *Bonney v. Ridgard*, 1 Cox, 148, *per* Lord Kenyon.

(*j*) *Id.*

(*k*) *Humble v. Bill*, 2 Vern. 445, *per Cur.*; *Ewer v. Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *Watts v. Kancie*, Toth. 77; *Nurton v. Nurton*, *id.*

(*a*) *Ewer v. Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *Humble v. Bill*, 2 Vern. 445, *per Cur.*; *Nugent v. Gifford*, 1 Atk. 464, *per* Lord Hardwicke; *Mead v. Orrery*, 3 Atk. 242, *per eundem*.

in aid for payment of debts is not bound to inquire into the fact whether the sale is made necessary by the existence of debts, because he has no adequate means to prosecute such an inquiry, so he who deals for personal assets is, for the same reason, absolved from all inquiry with respect to debts: and it is upon this principle altogether indifferent what dispositions may be made in the will with respect to the personal property for which he deals; for whether it be specifically given or be part of the residuary estate, it is equally available in law for the payment of debts" (b).

Thus nothing can be clearer than that an executor may go to market with his testator's assets, (even with a chattel specifically bequeathed (c),) and the purchaser will not be bound to see to the application of his purchase-money (d).

[But an executor or administrator cannot mortgage the assets to raise money for repairing or re-instating dilapidated buildings unless the testator or intestate was liable under covenants to execute the works (e).]

31. **Fraud an exception.**—But *fraud* and *collusion* will vitiate any transaction, and turn it to a mere colour (f), and therefore if fraud be proved, either expressed or implied, the parties cannot protect themselves by pleading the general rule (g). The only question is, What will amount to a case of fraud?

* **a. Sale at a nominal price.**—The sale cannot stand if the chattel be sold at a *nominal price* or a *fraudulent undervalue* (a). [*479]

(b) *Keane v. Robarts*, 4 Mad. 356.

(c) *Watts v. Kancie*, Toth. 77, 161; *Nurton v. Nurton*, Ib.; *Ewer v. Corbet*, 2 P. W. 148. As to *Humble v. Bill*, 2 Vern. 444, 1 B. P. C. 71, see *Ewer v. Corbet*, *ubi supra*; *Andrew v. Wrigley*, 4 B. C. C. 137; *M'Leod v. Drummond*, 17 Ves. 160.

(d) *Bonney v. Ridgard*, 1 Cox, 147, per Lord Kenyon.

(e) *Ricketts v. Lewis*, 51 L. J. N. S. Ch. 837.]

(f) *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow.

(g) *Watkins v. Cheek*, 2 S. & S. 205, per Sir J. Leach; *M'Leod v. Drummond*, 17 Ves. 154, per Lord

Eldon; *Hill v. Simpson*, 7 Ves. 166, per Sir W. Grant; *Taner v. Ivie*, 2 Ves. 469, per Lord Hardwicke; *Keane v. Robarts*, 4 Mad. 357, per Sir J. Leach; *Crane v. Drake*, 2 Vern. 616; *Nugent v. Gifford*, 1 Atk. 463, per Lord Hardwicke; *Mead v. Orrery*, 3 Atk. 240, per *eundem*; *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow; *Whale v. Booth*, 4 T. R. 625, note (a), per Lord Mansfield; *Elliot v. Merryman*, Barn. 81, per Sir J. Jekyll; *Bonney v. Ridgard*, 1 Cox, 147, per Lord Kenyon; *Earl Vane v. Rigden*, 5 L. R. Ch. App. 663, &c.

(a) *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow; *Ewer v. Corbet*, 2 P.

β. Sale by executor for payment of his own debt.—The executor may not sell or pledge the assets for raising money to carry on the testator's business, though in pursuance of the directions contained in his will, for the debts of the business are not the testator's debts, [and a direction by a testator that his trade shall be carried on by his executors does not authorise the employment in that trade of more of the testator's property than was employed by him in his business] (b), or to pay or secure the executor's own debt (c), or for a debt *wrongfully contracted* by him as executor (d), for *prima facie* this is a diversion of the assets to a purpose wholly foreign to the administration, and therefore a *devastavit*. "Though," observed Sir W. Grant, "it may be dangerous at all to restrain the power of *purchasing* from the executor, what inconvenience can there be in holding that the assets known to be such should not be applied in any case for the *executor's debt*, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to *sell* the assets, but it is not essential that he should have the power to pay his own creditor; and it is not just that one man's property should be applied to the payment of another man's debt" (e).

Where the executor is specific or residuary legatee.—But if the executor *be also the specific* (f), or *residuary legatee* (g),

W. 149, *per* Sir J. Jekyll; M'Mullen v. O'Reilly, 15 Ir. Ch. Rep. 251; and see Drohan v. Drohan, 1 B. & B. 185.

(b) McNeillie v. Acton, 2 Eq. Rep. 21; 4 De G. M. & G. 744. [But the executors may sell or pledge any part of the property actually employed in the business, and it has been held in a recent case in Ireland that the power of disposition extends to mortgaging the freehold premises upon which the business is carried on; Devitt v. Kearney, 13 L. R. Ir. 45; reversing S. C. 11 L. R. Ir. 225.]

(c) Scott v. Tyler, 2 Dick. 712; Hill v. Simpson, 7 Ves. 152; Watkins v. Cheek, 2 S. & S. 205, *per* Sir J. Leach; Keane v. Robarts, 4 Mad. 357, *per eundem*; Crane v. Drake, 2 Vern.

616; Anon. case, cited Pr. Ch. 434; Andrew v. Wrigley, 4 B. C. C. 137, *per* Lord Alvanley; and see Eland v. Eland, 4 M. & Cr. 427; Miles v. Durnford, 2 De G. M. & G. 641; [Jones v. Stühwasser, 16 Ch. D. 577.]

(d) Collinson v. Lister, 20 Beav. 356; 7 De G. M. & G. 634.

(e) Hill v. Simpson, 7 Ves. 169.

(f) Taylor v. Hawkins, 8 Ves. 209.

(g) Nugent v. Gifford, 1 Atk. 463; corrected from Reg. Lib. 4 B. C. C. 136; Mead v. Orrery, 3 Atk. 235; Whale v. Booth, 4 T. R. 625, note (a). See the comments of Lord Eldon, M'Leod v. Drummond, 17 Ves. 163; and see Bedford v. Woodham, 4 Ves. 40, note; Storry v. Walsh, 18 Beav. 559.

then it seems to be established upon the authority of several cases that he *may* dispose of the chattel in payment of his own debt, for as soon as the debts and legacies of the testator have been discharged, the property is the executor's; and how is a purchaser to ascertain, but from the mouth of the executor, whether such prior liabilities upon the estate have been fully satisfied?

* **Where the executor is specific legatee jointly with** [*480] **another, or subject to a charge.**—But if the executor is specific or residuary legatee, *jointly with others, or subject to certain charges under the will*, then he has no power by himself to offer the chattel in payment of his own debt. For in what character does the executor sell? It must be either as executor or as legatee: not as executor, for then he cannot pay his own debt with the testator's assets; and not as legatee, for he is not exclusively such, but only jointly with others, or subject to certain charges. The creditor therefore cannot deal for the chattel without the concurrence of the co-legatees, or of the other persons jointly entitled (a). And the *mere representation* by the executor that he is absolute owner under the will is no protection, for common prudence requires that the purchaser should look to the will himself and ascertain the fact; and if he neglect this precaution, and assume the executor's veracity, he must incur the hazard of the executor's falsehood (b).

Express notice that debts not paid.—The executor in his character of specific or residuary legatee cannot pay or secure the debt of his own creditor out of the testator's assets, if such creditor have *express* notice that any debt of the testator still remains unsatisfied (c).

γ. **Sale by executor for other private purposes.**—If the executor sell or mortgage for money either advanced at the time or to be advanced, the dealing *prima facie* is in a due course of administration (d). "Where," observed Sir W.

(a) Bonney v. Ridgard, 1 Cox. 145; Hill v. Simpson, 7 Ves. 152, see 170; and see Haynes v. Forshaw, 11 Hare, 93.

(b) Hill v. Simpson, 7 Ves. 152, see 170.

(c) See Nugent v. Gifford, 1 Atk. 464; Whale v. Booth, 4 T. R. 625, note (a); M'Leod v. Drummond, 17 Ves. 163.

(d) M'Leod v. Drummond, 17 Ves. 155, per Lord Eldon.

Grant, "a party having a debt due to him by the executor takes, in satisfaction of that debt, the assets which he knows belong to the executor only in that character, undoubtedly suspicion of fraud must always arise; but where a man is applied to for a loan of money there is no motive of fraud, for he may keep his money if not satisfied with the security" (e). But such is the *prima facie* presumption only, for if there be legal evidence to the purchaser or mortgagee that the immediate or future advance is not on account of the testator's estate, but is meant to be applied to the private purposes of the executor, the Court must regard the transaction as fraudulent, and will not allow it to stand (f).

δ. Sale of specific chattel, and notice that there are no debts.

— A purchaser cannot deal with an executor for the [*481] purchase * of a chattel specifically bequeathed, if the purchaser have notice, (a fact, however, not easily to be proved, and not lightly to be presumed,) that there were no debts of the testator, or that they have since been discharged (a).

ε. Payment to executor who will probably misapply it. — If a person owe money to a testator's estate, and be apprised that the executor *means to misapply it*, he cannot safely hand it over (b).

ς. Payment after long interval from testator's death. — If a great *length of time* has elapsed since the testator's death, it may be argued that here all debts must be *presumed* to be paid, and that the executor is a trustee for the next of kin, and that the money cannot be paid safely to any other than the next of kin as the *cestui que trust*. However, in the absence of all *mala fides* the executor's receipt will in general be sufficient. Where there had been a lapse of sixteen years,

(e) *M'Leod v. Drummond*, 14 Ves. 362; and see *Miles v. Durnford*, 2 De G. M. & G. 641.

(f) *M'Leod v. Drummond*, 14 Ves. 353; S. C. reversed, 17 Ves. 152; *Scott v. Tyler*, 2 Dick. 712, compare 17 Ves. 166; and see *Keane v. Robarts*, 4 Mad. 358.

(a) *Ewer v. Corbet*, 2 P. W. 149, per Sir J. Jekyll; and see *M'Mullen v. O'Reilly*, 15 Ir. Ch. Rep. 251.

(b) See *Watkins v. Cheek*, 2 S. & S. 199; *Eland v. Eland*, 4 M. & Cr. 427; *Stroughill v. Anstey*, 1 De G. M. & G. 648.

Lord Hatherley observed, "there is no authority for holding that merely because a debt to the testator's estate is not called in for some time, we are to imply that the executors have ceased to be executors, and have become trustees. A debtor who has been paying interest for perhaps twenty years, does not therefore become cognizant of the fact of all the testator's estate having been administered, and of the executors having become trustees. The persons with whom the executors are dealing, are not bound to know the state of the testator's assets, and it may be many years before all his debts are paid, and his estate wound up" (c). In a case where there had been a lapse of *thirty-five years* from the testator's death, and no allegation of debts, the late V. C. of England held that the executor could sign a receipt (d), [but the rule has now been adopted that after *twenty years* it is fair to presume that the debts have been paid and the onus is upon the executors to show such is not the case (e).] As regards an *administrator* it will be remembered that all necessary protection is thrown around the estate by the bond taken for due administration, and also by the form of proceeding in the Probate Court; for if A., (to *whose [*482] estate the money is owing) die, leaving B. his next of kin, who afterwards dies, leaving C. his next of kin, who afterwards dies, leaving D. his next of kin, in order to take out letters of administration to A., you must first show yourself to have an interest by taking out letters to B. And again, to take out letters to B. you must first, for the same reason, take out letters to C.; so that, in fact, letters cannot be taken out to A. without previously taking out letters to B. and C. If, in such a case, the receipt of A.'s administrator, even after the lapse of twenty years, were not suffi-

(c) *Charlton v. Earl of Durham*, 4 L. R. Ch. App. 438; and see *Sabin v. Heape*, 27 Beav. 553.

(d) *Gough v. Birch*, July 10, 1839, MS.; see *Stroughill v. Anstey*, 1 De G. M. & G. 654; [*Re Tanqueray-Willaupe and Landau*, 20 Ch. D. 465; *Re Molyneux and White*, 13 L. R. Ir. 382;] *Ewer v. Corbet*, 2 P. W. 148; *Court v. Jeffery*, 1 S. & S. 105; *Orrok*

v. Binney. Jac. 523; *Pierce v. Scott*, 1 Y. & C. 257; *Forbes v. Peacock*, 11 Sim. 152; *Hawkins v. Williams*, Q. B. 10 W. R. 692; *Greetham v. Colton*, 6 N. R. 311; *Williams v. Massey*, 15 Ir. Ch. Rep. 68.

[(e) *Re Tanqueray-Willaupe and Landau*, 20 Ch. D. 465; *Re Molyneux and White*, 13 L. R. Ir. 382.]

cient, it would be necessary in a suit to make the administrators of B. and C. parties as *cestuis que trust*, a thing quite unheard of in practice. In an extreme case, however, where an administrator who was beneficially entitled to one-fourth, filed a bill *one hundred and fifty years* after the intestate's decease, the Court, while it admitted the plaintiff's legal title to the whole, refused to order payment to him of the other three-fourths, which apparently belonged in equity to other parties (a).

ζ. **Sale by banker by direction of executor.**—An *agent* is accountable to his principal only, and therefore if an executor employ a banker to sell out part of the testator's stock and remit the proceeds to him, it seems the banker, though he has reason to believe that a misapplication is intended, is bound to transfer the money to the executor, and does not thereby render himself accountable. A contrary doctrine would carry the principle of constructive trust to an inconvenient and, indeed, to an impracticable length (b); [and

(a) *Loy v. Duckett*, Cr. & Ph. 305. [In a recent case, in 1885, where stock standing in the name of an owner, who died in 1791, had been transferred to the Commissioners for the reduction of the National Debt, and an inquiry was directed upon petition who were the persons entitled to the fund, the Court directed that the beneficial title should be inquired into as regarded all the shares to which the legal personal representatives of persons who died before 1871 were entitled; *Ex parte Roskrow*, W. N. 1885, p. 3.]

(b) *Keane v. Robarts*, 4 Mad. 332, see 356, 359; and see *Davis v. Spurling*, 1 R. & M. 64; S. C. Taml. 199; *London Chartered Bank of Australia v. Lempière*, 4 L. R. P. C. 585; [The New Zealand and Australian Land Company v. Watson, 7 Q. B. D. 374; reversing S. C. 5 Q. B. D. 474;] *Crisp v. Spranger*, Nels. 109; *Saville v. Tancred*, 3 S. W. 141, note; *Ex parte Barnwell*, 6 De G. M. & G. 801; *Gray v. Johnston*, 3 L. R. H. L. 1. In this case, before the House of Lords, the

doctrine as laid down by Lord Cairns was, that on the one hand bankers were not on grounds of mere suspicion or curiosity, to refuse to honour the cheque of an executor or trustee, being their customer, and on the other hand, that bankers were not, under shelter of that title, to be at liberty to become parties or privies to a breach of trust, and to pay away trust money when they *knew* it was going to be misapplied, and for the purpose of its being so misapplied; and he stated the result of the cases to be, that to justify a banker in refusing payment, 1. There must be a misapplication or breach of trust actually intended. 2. The bankers must be privy to such intended misapplication or breach of trust, and 3. That any personal benefit to the bankers designed or stipulated for, would be the strongest evidence of such privity, *Ib.* p. 11. But the principle enunciated by Lord Westbury went further, for he said that a banker could not be allowed to set up the *jus tertii* against the order of his own

an agent is bound to accept as correct the *trustees' statement as to the intended application of the fund (a).] But an agent who derives a *personal benefit* from the breach of trust of his principal will be accountable (b).

7. *Sale before probate.* — Though an executor *can* make an assignment and give a receipt for purchase-money before *probate*, yet a purchaser is not *bound to pay* his purchase-money before probate, which is the evidence of the executor's title (c).

[32. *Payment by order of executor.* — If a person indebted to a testator's estate pays a third party by order of the executor and obtains the executor's receipt without notice that the payment is wrongfully made, he thereby obtains a complete discharge (d).]

33. *Who may impeach the sale.* — Wherever, as in the several cases mentioned, there is suspicion of fraud, the transaction may be impeached by creditors (e), or specific (f), residuary (g), or even pecuniary legatees (h).

Effect of time. — But in no case will the Court grant re-

customer, or refuse to honour his draft on any other ground than some sufficient one resulting from the act of the customer himself, and that if a banker became incidentally aware that a trustee, his customer, meditated a breach of trust, and drew a cheque for that purpose, the banker had no right to refuse payment of the cheque, as this would be making himself party to an inquiry as between his customer and third persons. But that if a trustee being indebted to a banker, applied part of the trust estate in the banker's hands to the payment of the debt, the banker became *particeps criminis*, and was answerable. *Ib.* p. 14. It would seem, therefore, that, in Lord Westbury's opinion, if the trustee did not himself confess the breach of trust, the banker could not refuse payment on evidence *aliunde* that a breach of trust was intended; and see *Barnes v. Addy*, 9 L. R. Ch. App. 244.

[(a) *Rodbard v. Cooke*, 25 W. R. 555.]

(b) *Pannell v. Hurley*, 2 Coll. 241; *Bodenham v. Hoskyns*, 2 De G. M. & G. 903; [*Foxton v. Manchester and Liverpool District Banking Company*, 44 L. T. N. S. 406.]

(c) *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 588.

[(d) *Ferrier v. Ferrier*, 11 L. R. Ir. 50; and see *ante*, p. 447.]

(e) *Crane v. Drake*, 2 Vern. 616; *Anon.* case cited, Pr. Ch. 434; and see *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Orrery*, 3 Atk. 238.

(f) *Humble v. Bill*, 2 Vern. 444; *Scott v. Tyler*, 2 Dick. 712.

(g) See *Burting v. Stonard*, 2 P. W. 160; *Mead v. Orrery*, 3 Atk. 235, see 238; *M'Leod v. Drummond*, 17 Ves. 161, 169.

(h) *Hill v. Simpson*, 7 Ves. 152; and see *M'Leod v. Drummond*, 17 Ves. 169.

lief where the right of unravelling the transaction has been neglected for a period of twenty years (i).

34. *Executor or administrator of a trustee.*—The preceding powers belong to executors and administrators for the purpose of administration of the testator's or intestate's estates. But these powers cannot be assumed to exist where property, though legally vested in an executor or administrator, is not *available for the ordinary purposes of administration. Thus the *executor or administrator* of a surviving *trustee* stands on no higher ground than an ordinary trustee, and cannot therefore pass a good title to the purchaser, unless it be warranted by the terms of the trust.

SECTION III.

DISABILITY OF TRUSTEES FOR SALE TO BECOME PURCHASERS OF THE TRUST PROPERTY.

We now come to the subject of *purchases by trustees* of the property vested in them upon trust.¹

Under this head it will be proper to consider, *First*, The extent and operation of the rule, that a trustee shall not purchase the trust estate; *Secondly*, The species of relief

(i) *Andrew v. Wrigley*, 4 B. C. C. and see *M'Leod v. Drummond*, 14 125; *Bonney v. Ridgard*, 1 Cox, 145; *Ves.* 353; reversed 17 *Ves.* 152, see *Mead v. Orrery*, 3 Atk. 235, see 243; 171.

¹ *Trustee purchasing.*—A trustee who is selling trust property may not purchase at his own sale for his own benefit, and this applies generally to any one holding any fiduciary relation; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Dyer v. Shurtleff*, 112 Mass. 165; *Wistar's App.* 54 Pa. St. 60; *European R. R. Co. v. Poor*, 59 Me. 277; *Prewett v. Coopwood*, 30 Miss. 369; *Gass v. Mason*, 4 Sneed, 497; *Powell v. Cobb*, 3 Jones Eq. 456; *Taylor v. Taylor*, 8 How. 183.

This applies generally to all sales, contracts and negotiations between cestui que trust and trustee; *Pairo v. Vickery*, 37 Md. 467; *Wright v. Campbell*, 27 Ark. 637; *Boynnton v. Brastow*, 53 Me. 362; *Farnam v. Brooks*, 9 Pick. 212; *Staats v. Bergen*, 2 C. E. Green, 554.

Either the trustee purchasing will become a constructive trustee or the sale will be void, at the option of the cestui que trust, unless he can show it to be fair and favorable to the cestui que trust; *Shelton v. Homer*, 5 Met. 462; *Johnson v. Blackman*, 11 Conn. 343; *Freeman v. Harwood*, 49 Me. 195; *Child v. Brace*, 4 Paige, 309; *Michoud v. Girod*, 4 How. 503; *Cram v. Mitchell*, 1 Sandf. Ch. 251.

to which the *cestui que trust* is entitled; *Thirdly*, The time within which the *cestui que trust* must apply to the Court.

Neither may the trustee receive a gift from the *cestui que trust*; *Wright v. Smith*, 23 N. J. Eq. 106; *Renew v. Butler*, 30 Ga. 964; *Smith v. Drake*, 23 N. J. Eq. 302; *Cadwalader's App.* 64 Pa. St. 293.

These principles are not to be received without some modification. If, on careful examination, it clearly and plainly appears that the transaction is favorable to the *cestui que trust*, that there is no fraud or concealment of material facts and that a strict investigation can discern no fault in the trustee in the management of the trust sale, the trustee may hold even though he purchases at his own sale; *Brown v. Cowell*, 116 Mass. 465; *Dunn v. Dunn*, 42 N. J. Eq. 431; *Pratt v. Thornton*, 28 Me. 355; *Lyon v. Lyon*, 8 Ired. Eq. 201; *Johnson v. Bennett*, 39 Barb. 237; *Jennison v. Hapgood*, 7 Pick. 1; *McCartney v. Calhoun*, 17 Ala. 301; *Rice v. Cleghorn*, 21 Ind. 80.

Such purchases by the trustee are not void, but voidable only; *Ives v. Ashley*, 97 Mass. 188; *Dodge v. Stevens*, 94 N. Y. 209; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Graves v. Waterman*, 63 N. Y. 657; *Mercer v. Newsom*, 23 Ga. 151; *Hoitt v. Webb*, 36 N. H. 158; *Van Epps v. Van Epps*, 9 Paige, 237.

To sustain such a sale the purchaser must show the straightforwardness of the transaction, the burden of proof resting on him; *M'Cants v. Bee*, 1 McCord's Ch. 383; 16 Am. Dec. 610; *Pairo v. Vickery*, 37 Md. 467; *Mackey v. Coates*, 70 Pa. St. 350; *Jamison v. Glascock*, 29 Mo. 191; *Robbins v. Butler*, 24 Ill. 387. The utmost good faith is required to sustain such a sale; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; any profit obtained by trustee in purchasing accrues to the trust estate; *Brackenridge v. Holland*, 2 Blackford, 377; 20 Am. Dec. 123; if the *cestui que trust* objects, the trustee may not purchase; *Chorpening's App.* 32 Pa. St. 315; 72 Am. Dec. 789; a trustee should not purchase while a fiduciary relation exists; *Pratt v. Thornton*, 28 Me. 355; 48 Am. Dec. 492; *Wormley v. Wormley*, 8 Wheat. 421; he should first divest himself of his fiduciary character; *Murdock's Case*, 2 Bland's Ch. 461; 20 Am. Dec. 381. A purchase by a trustee can be questioned only by the *cestui que trust*; *Wilson v. Troup*, 2 Cow. 195; 14 Am. Dec. 458; *Larco v. Casaneuava*, 30 Cal. 500; *Thorpe v. McCullum*, 1 Gilm. 614; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Newcomb v. Brooks*, 16 W. Va. 32. An administrator is so far a trustee that he should not purchase at his own sale; *Martin v. Wyncoop*, 12 Ind. 266; 74 Am. Dec. 209; *Mulford v. Minch*, 3 Stock Ch. 16; *Murchison v. White*, 54 Tex. 85; *Boyd v. Blankman*, 29 Cal. 19; *Gardner v. Butler*, 30 N. J. Eq. 725; *Morgan v. Wattles*, 69 Ind. 263. A very slight advantage to the trustee, or showing of his bad faith, is sufficient for setting the sale aside; *Buell v. Buckingham*, 16 Ia. 284; 85 Am. Dec. 516; *Herbert v. Hanrick*, 16 Ala. 581; *Hannah v. Carrington*, 18 Ark. 85. A trustee may not acquire an outstanding title to trust property for his own benefit; *Morrison v. Caldwell*, 5 T. B. Mon. 426; 17 Am. Dec. 84; whether he be trustee, mortgagee, life tenant or purchaser otherwise; *Morgan v. Boone*, 4 T. B. Mon. 291; 16 Am. Dec. 153. If a trustee purchases a mortgage or a judgment at a discount he cannot claim the benefit; *Green v. Winter*, 1 Johns. Ch. 27; 7 Am. Dec. 475. An executor may not purchase for himself; *Bailey v. Robinsons*, 1 Gratt. 4; 42 Am. Dec. 540. That a person holding a fiduciary relation may not purchase does not apply to any particular class of persons, but it is of universal application; cases of pledgor and pledgee come

First. The extent of the rule.

1. **Trustee for sale may not purchase.** — A trustee for *sale*, that is, a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property (*a*), whether it be real estate or a chattel personal (*b*), land, or a ground rent (*c*), in reversion or possession (*d*), whether the pur-

(*a*) *Fox v. Mackreth*, 2 B. C. C. 400; S. C. 2 Cox, 320; affirmed in D. P. 4 B. P. C. 258, &c. That *Fox v. Mackreth* was decided upon this ground, see *Gibson v. Jeyes*, 6 Ves. 377; *Ex parte Lacey*, Id. 627; *Ex parte James*, 8 Ves. 353; *Coles v. Trecothick*, 9 Ves. 247; *Ex parte Bennett*, 10 Ves. 394.

S. C. 3 B. C. C. 117; *Killick v. Flexney*, 4 B. C. C. 161; *Hall v. Hallet*, 1 Cox, 134; *Whatton v. Toone*, 5 Mad. 54; 6 Mad. 153.

(*c*) *Price v. Byrn*, cited *Campbell v. Walker*, 5 Ves. 681.

(*d*) *Re Bloye's Trust*, 1 Mac. & G. 488, see 492, 495; *Spring v. Pride*, 4 De G. J. & S. 395.

(*b*) *Crowe v. Ballard*, 2 Cox, 253;

under this rule; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779. In case such a purchase is made a resale may be ordered; *Buckles v. Lafferty*, 2 Rob. (Va.) 292; 49 Am. Dec. 752; *Scott v. Freeland*, 7 Smed. & M. 409; 45 Am. Dec. 310. A trustee may purchase after the trust ceases; *Munn v. Burges*, 70 Ill. 604; *Bush v. Sherman*, 80 Ill. 160. A cestui que trust may so acquiesce in, and confirm a sale, as to estop himself from objecting to it; *Mulford v. Minch*, 3 Stock Ch. 16; 64 Am. Dec. 472; *Hallman's St.* 13 Phila. 562; especially if it be for a long time; *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Scott v. Freeland*, 7 Sm. & Marsh. 409; and if ratified by a cestui que trust it cannot be set aside by a stranger; *Johnson v. Bennett*, 39 Barb. 237; *Jackson v. Van Dalbsen*, 5 Johns. 43; *Beeson v. Beeson*, 9 Pa. St. 279; *Boerum v. Schenck*, 41 N. Y. 182; the cestui que trust must either ratify or set aside the sale, whether public or private, within a reasonable time; *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435; *Alexander v. Alexander*, 46 Ga. 291.

The rule forbids that a receiver, who has bought at a foreclosure, when he as receiver held the equity, should be allowed to hold as against a cestui que trust who claims beneficially of the purchaser; *Jewett v. Miller*, 10 N. Y. 402; 61 Am. Dec. 751. A trustee for bondholders cannot deal in the bonds for his own benefit, or lease a road to a company in which he is a stockholder; *Ashuelot R. R. v. Elliott*, 57 N. H. 397; a trustee purchasing for less than value, may be charged full value; *Prichard v. Farrar*, 116 Mass. 213. A purchase by a wife of a trustee may be allowed by an order of court; *Dundas's App.* 64 Pa. St. 325; a confidential adviser should not purchase on his own account; *Wakeman v. Dodd*, 27 N. J. Eq. 564. A trustee may not allow land to be sold for taxes, and then acquire a title at the sale; *Frierson v. Branch*, 30 Ark. 453. A purchase at a foreclosure sale may be valid; *Adams v. La Rose*, 75 Ind. 471; or one indirectly, through a third party; *Creveling v. Fritts*, 34 N. J. Eq. 134. Such a sale, though it may be set aside by the trustee; *Clark v. Deverana*, 1 S. C. 172; *Star Co. v. Palmer*, 41 N. Y. Supr. Ct. 267; *Kern v. Chalfant*, 7 Minn. 487; is valid as against strangers; *Union Slate Co. v. Tilton*, 69 Me. 244; *Miller v. Iowa Land Co.* 56 Ia. 374. Trustee must make full disclosure and show adequate price; *Spencer's App.* 80 Pa. St. 317.

chase be made in the trustee's own name or in the name of a trustee for him (*e*), by private contract or public auction (*f*), from himself as the single trustee, or with the sanction of his *co-trustees (*a*); for he who [*485] undertakes to act for another in any matter cannot, in the same matter, act for himself (*b*). The situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit (*c*). Besides, if the trustee appeared at the auction professedly as a bidder, that would operate as a discouragement to others, who seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition, and so the sale would be chilled (*d*).

Trustee who has disclaimed.— But the rule does not apply to a person named as trustee, but who has *disclaimed* without having acted in the trust (*e*), [or to a person who has the power of becoming a trustee though he never actually does become one (*f*),] or to a *tenant for life* whose *consent to the sale* is required by the terms of the power (*g*); or to mere nominal trustees as *trustees to preserve contingent remainders* (*h*); or where A. is the trustee in fee for B. in fee, and

(*e*) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601; *Randall v. Errington*, 10 Ves. 423; *Crowe v. Ballard*, 2 Cox, 253; S. C. 3 B. C. C. 117; *Hall v. Hallett*, 1 Cox, 134; *Watson v. Toone*, 6 Mad. 153; *Baker v. Carter*, 1 Y. & C. 250; *Knight v. Majoribanks*, 2 Mac. & G. 12.

(*f*) *Campbell v. Walker*, *Randall v. Errington*, *ubi supra*; *Ex parte Bennett*, 10 Ves. 381, see 393; *Ex parte James*, 8 Ves. 337, see 349; *Whelpdale v. Cookson*, 1 Ves. 9; S. C. stated from *R. L. Campbell v. Walker*, 5 Ves. 682; *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, Id. 625; *Lister v. Lister*, Id. 631; *Whichcote v. Lawrence*, 3 Ves. 740; *Attorney-General v. Lord Dudley*, G. Coop. 146; *Downes v. Grazebrook*, 3 Mer. 200.

(*a*) *Whichcote v. Lawrence*, 3 Ves. 740; *Hall v. Noyes*, cited Id. 748; and see *Morae v. Royal*, 12 Ves. 374.

(*b*) *Whichcote v. Lawrence*, 3 Ves. 750; *per Lord Rosslyn*; *Ex parte Lacey*, 6 Ves. 626, *per Lord Eldon*; *Re Bloye's Trust*, 1 Mac. & G. 495.

(*c*) See *Ex parte James*, 8 Ves. 348.

(*d*) See *Ex parte Lacey*, 6 Ves. 629.

(*e*) *Stacey v. Elph*, 1 M. & K. 195; and see *Chambers v. Waters*, 3 Sim. 42.

[(*f*) *Clark v. Clark*, 9 App. Cas. 733.]

(*g*) *Howard v. Ducane*, T. & R. 81; *Bevan v. Habgood*, 1 J. & H. 222; *Dicconson v. Talbot*, 6 L. R. Ch. App. 32, see *ante*, p. 317.

(*h*) *Sutton v. Jones*, 15 Ves. 587; *Naylor v. Winch*, 1 S. & S. 567; *Pooley v. Quilter*, 4 Drew. 189; *Parkes v. White*, 11 Ves. 226.

A. has no duty to perform (i); or where a trustee sells to the trustees of his own settlement and under which he has partial interest (j).

2. **Lord Rosslyn's doctrine.**—Lord Rosslyn is reported to have considered that to invalidate a purchase by a trustee it was necessary to show that he had gained an *actual advantage* (k); but the doctrine (if any such was ever held by his Lordship (l) has since been expressly and unequivocally denied (m). The rule is now universal, that, *however fair the transaction*, the *cestui que trust* is at liberty to set aside the sale and take back the property (n). If a trustee [*486] were *permitted to buy in an *honest* case, he might buy in a case *having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise* (a). Thus a trustee for the sale of an estate may, by the knowledge acquired by him in that character, have discovered a valuable coal mine under it, and, locking that up in his own breast, might enter into a contract for the purchase by himself. In such a case, if the trustee chose to deny it, how could the Court establish the fact against the denial? The probability is that the trustee who had once conceived such a purpose would never disclose it, and the *cestui que trust* would be effectually defrauded (b).

3. **Trustee may not buy as agent.**—As a trustee cannot buy on his own account it follows that he cannot be permitted to buy as *agent* for a third person: the Court can

(i) *Pooley v. Quilter*, 4 Drew. 189; and see *Denton v. Donner*, 23 Beav. 289, 290.

(j) *Hickley v. Hickley*, 2 Ch. D. 190.

(k) See *Whichcote v. Lawrence*, 3 Ves. 750.

(l) See *Ex parte Lacey*, 6 Ves. 626; *Lister v. Lister*, *Id.* 632.

(m) *Ex parte Bennett*, 10 Ves. 385; *Ex parte Lacey*, 6 Ves. 627; *Attorney-General v. Lord Dudley*, G. Coop. 148; *Ex parte James*, 8 Ves. 348; *Mulvany v. Dillon*, 1 B. & B. 409, see 418.

(n) *Ex parte Lacey*, 6 Ves. 625, see 627; *Owen v. Foulkes*, cited, *Id.* 630, note (b); *Ex parte Bennett*, 10 Ves.

393, *per* Lord Eldon; *Randall v. Errington*, 10 Ves. 423, see 428; *Campbell v. Walker*, 5 Ves. 678, see 680; *Ex parte James*, 8 Ves. 347, 348, *per* Lord Eldon; *Lister v. Lister*, 6 Ves. 631; *Gibson v. Jeyes*, 6 Ves. 277, *per* Lord Eldon; see *Kilbee v. Sneyd*, 2 Moll. 186.

(a) *Ex parte Bennett*, 10 Ves. 386, *per* Lord Eldon.

(b) *Ex parte Lacey*, 6 Ves. 627, *per* Lord Eldon; and see *Ex parte Bennett*, 10 Ves. 385, 394, 400; *Ex parte James*, 8 Ves. 348, 349; *Parkes v. White*, 11 Ves. 226; *Campbell v. Walker*, 5 Ves. 681; *Lister v. Lister*, 6 Ves. 632; *Ex parte Badcock*, 1 Mont. & Mac. 239.

with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in the one case as in the other (c).

4. **Agent of trustee may not buy.**— And the rule against purchasing the trust property applies to an *agent* employed by the trustee for the purposes of the sale, as strongly as to the trustee himself (d). And an *agent not for sale, but for management only* (e), and a *receiver* appointed by the Court (f) stand in a confidential relation, and cannot purchase without putting themselves at arm's length, and a full disclosure of their knowledge; [and the partner of a trustee, or any other person through whom the trustee may directly or indirectly derive benefit by reason of the purchase, cannot purchase the trust property from the trustee (g).]

5. **Trustees may not lease to themselves.**— The *lease* of an estate is in fact the sale of a partial interest in it, and therefore trustees for sale cannot demise to one of themselves, but the lessee, while he shall be held to his bargain if disadvantageous to him, shall be made to account for the profits if it be in his favour (h).

*6. **Specific performance.**— Where a trustee for [*487] sale was the purchaser by an agent at the auction, the *heir* of the trustee had no right to have the contract completed at the expense of the *personal* estate, though the *cestuis que trust* were willing to acquiesce in the sale (a).

7. **Trustee may purchase from the cestui que trust.**— When it is said that a trustee for sale may not purchase the trust property, the meaning must be understood to be that the trustee may not *purchase from himself*, that is, he cannot

(c) *Ex parte Bennett*, 10 Ves. 381, see 400; *Coles v. Trecothick*, 9 Ves. 248, per Lord Eldon; and see *Gregory v. Gregory*, G. Coop. 204; [*Mockerjee v. Mockerjee*, 2 L. R. Ind. App. 18.]

(d) *Whitcomb v. Minchin*, 5 Mad. 91; *In re Bloye's Trust*, 1 Mac. & G. 488, see 495; [*Martinson v. Clowes*, 21 Ch. D. 857.]

(e) *King v. Anderson*, 8 I. R. Eq. 147, 625; *Alven v. Bond*, 1 Flan. & Kelly, 196.

(f) *Alven v. Bond*, 1 Flan. & Kelly, 196; *White v. Tommy*, referred to, *Ib.* 224.

[(g) *Ex parte Moore*, 51 L. J. N. S. Ch. 72; 45 L. T. N. S. 558; *Ex parte Burnell*, 7 Jur. 116.]

(h) *Ex parte Hughes*, 6 Ves. 617; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 500.

(a) *Ingle v. Richards* (No. 1), 28 Beav. 361.

perform the two functions of seller and buyer; for there is no rule that a trustee, whether for sale or otherwise, may not *purchase from his cestui que trust* (b). Hence, while a purchase by a trustee conducting the *sale*, either personally or by his agent, cannot stand, a purchase by a trustee from a *cestui que trust* of the interest of the latter in the trust *may* stand, if the trustee can show that the fullest information and every advantage were given to the *cestui que trust* (c). However, a purchase by a trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the Courts will watch with the utmost jealousy (d) [and will set aside if the consideration was insufficient (e)]; and the exception runs, it is said, so near the verge of the rule, that it might as well have been included within it (f).

8. **The relation of trustee and cestui que trust must first be dissolved.**— Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust* must be *actually* or *virtually* dissolved. The trustee may, if he pleases, retire from the office, and qualify himself for becoming a purchaser by divesting himself of that character (g), or if he retain the situation, the parties must be put so much at arm's length, that they agree to stand in the adverse situations of vendor and purchaser (h), the *cestui que trust* distinctly and fully understanding that he is selling to the trustee, and consenting to waive all objections upon that

(b) *Ex parte Lacey*, 6 Ves. 626, per Lord Eldon; *Coles v. Trecothick*, 9 Ves. 244, 246, per eundem; *Gibson v. Jeyes*, 6 Ves. 277, per eundem; *Downes v. Grazebrook*, 3 Mer. 208, per eundem; *Randall v. Errington*, 10 Ves. 426, per Sir W. Grant; *Whichcote v. Lawrence*, 3 Ves. 750, per Lord Rosslyn; *Sanderson v. Walker*, 13 Ves. 601, per Lord Eldon; *Ayliffe v. Murray*, 2 Atk. 59, per Lord Hardwicke; *Kilbee v. Sneyd*, 2 Moll. 214, per Sir A. Hart.

(c) *Denton v. Donner*, 23 Beav. 285; *Luff v. Lord*, 34 Beav. 220.

(d) *Coles v. Trecothick*, 9 Ves. 244, per Lord Eldon; *Ex parte Lacey*, 6 Ves. 626, per eundem; *Downes v. Graze-*

brook, 3 Mer. 209, per eundem; *Plowright v. Lambert*, 52 L. T. N. S. 646.

[(e) *Mockerjee v. Mockerjee*, 2 L. R. Ind. App. 18.] *Plowright v. Lambert*, 52 L. T. N. S. 646.

(f) *Morse v. Royal*, 12 Ves. 372, per Lord Erskine.

(g) *Downes v. Grazebrook*, 3 Mer. 208, per Lord Eldon.

(h) *Gibson v. Jeyes*, 6 Ves. 277, per Lord Eldon; and see *Ex parte Lacey*, 6 Ves. 626, 627; *Ex parte Bennett*, 10 Ves. 394; *Morse v. Royal*, 12 Ves. 373; *Sanderson v. Walker*, 13 Ves. 601; [*Re Worssam*, 46 L. T. N. S. 584.]

ground (i), *and the trustee fairly and honestly dis- [*488] closing all the necessary particulars of the estate, and not attempting a furtive advantage to himself by means of any private information (a). The trustee will not be allowed to go on acquainting himself with the nature of the property up to the moment of sale, and then casting aside his character of trustee, turn his experience to his own account (b).

9. Instances where trustee has been allowed to purchase. — In what cases a trustee will be at liberty to become a purchaser, may be best illustrated by a few instances.

Where the *cestui que trust* took the whole management of the sale himself, chose, or at least approved, the auctioneer, made surveys, settled the plan of sale, fixed the price, and so had a perfect knowledge of the value of the property, and then by his agent, but with his own personal consent, agreed to sell a lot which had been bought in to one of the trustees for sale acting as agent for another, Lord Eldon said, that if in any instance the rule was to be relaxed by consent of the parties, this was the case, and decreed the agreement to be specifically performed (c).

Again, a *cestui que trust* had strongly urged the purchase upon one of his trustees, who at first expressed an unwillingness, but afterwards, upon being pressed, agreed to the terms; and the sale was supported (d).

So, where a trustee for sale had endeavored in vain to dispose of the estate, and then purchased himself of the *cestui que trust*, at a fair and adequate price, and there was no imputation of fraud or concealment, Lord Northington said, "He did not like the circumstance of a trustee dealing with his *cestui que trust*, but upon the whole, he did not see any principle upon which he could set the transaction aside" (e).

(i) See *Randall v. Errington*, 10 Ves. 427, per Sir W. Grant; [*Re Worssam*, 46 L. T. N. S. 584.]

(a) *Coles v. Trecothick*, 9 Ves. 247, per Lord Eldon; *Morse v. Royal*, 12 Ves. 373, 377, per Lord Erskine; *Gibson v. Jeyes*, 6 Ves. 277, per Lord Eldon; *Randall v. Errington*, 10 Ves.

(b) See *Ex parte James*, 8 Ves. 352; *Spring v. Pride*, 4 De G. J. & S. 395.

(c) *Coles v. Trecothick*, 9 Ves. 234.

(d) *Morse v. Royal*, 12 Ves. 355.

(e) *Clarke v. Swaile*, 2 Eden, 134.

10. *Solicitor of the cestui que trust*. — It has been pronounced too dangerous to allow the *cestui que trust's* solicitor, without a *special* authority, to bind his employer by such a contract with the trustee (*f*).

11. *Creditors*. — Where the *cestuis que trust* are creditors, it has been held that the trustee cannot purchase with the sanction of the major part of them, but that the liberty must be given by the unanimous voice of the whole [*489] body (*g*). However, the Court has sanctioned * purchases of a bankrupt's estate by *assignees*, where the assent of a general meeting of creditors had been obtained (*a*); and the Court would, no doubt, in executing the trust of a creditors' deed, allow a trustee to purchase, if it were really for the benefit of the creditors.

12. *Court will not authorise the trustee to bid*. — The Court has no jurisdiction on behalf of the *cestuis que trust* who are *sui juris* to authorise a trustee to bid, for that is a question the *cestuis que trust* are entitled to decide for themselves (*b*). So far as the Court is concerned, it will not give a trustee leave to bid, for it is his duty to communicate all the information he can for the benefit of the sale, and this he might not be disposed to do if he were allowed to purchase himself (*c*). But if a sale by auction under the direction of the Court has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may be induced to accept the offer (*d*).

[13. *Effect of leave to bid*. — Where, in an administration action, leave was given to the solicitor for the defendant (the executor) to bid at the sale, which was to be conducted by the plaintiffs' solicitors, independently of the executor, it was held that the effect of the leave was to put an end to the fiduciary relation in which he formerly stood, and to

(*f*) *Downes v. Grazebrook*, 3 Mer. 209, *per* Lord Eldon.

(*g*) *Sir G. Colebrooke's case*, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, Id. 628; the cases cited Id. 630, note (*b*). *Whelpdale v. Cookson* (cited *Campbell v. Walker*, 5 Ves.

682), was doubted by Lord Eldon, 6 Ves. 628.

(*a*) *Anon. case*, 2 Russ. 350; *Ex parte Bage*, 4 Mad. 459.

(*b*) See *Ex parte James*, 8 Ves. 352.

(*c*) *Tennant v. Trenchard*, 4 L. R. Ch. App. 545.

(*d*) S. C. 4 L. R. Ch. App. 547.

place him in the position of a mere stranger, and that he was under no obligation to disclose to the Court any facts within his knowledge affecting the value of the property (*e*). But if the intending purchaser lays any information before the Court for the purpose of obtaining its approval of the sale, he is bound to disclose all the material facts within his knowledge; and L. J. Baggallay, in delivering the judgment of the Court of Appeal in *Boswell v. Coaks*, observed: — “The Court is neither buyer nor seller, and it is the duty of everyone laying materials before it for the purpose of obtaining its approval of any transaction to take care that the materials furnished to guide the Court shall not be incomplete or misleading. If the approval of the Court has been obtained by misrepresentation, or by the withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud, and will act accordingly” (*f*).]

14. *Where cestuis que trust are infants.* — If the *cestuis que trust* be under disability, as infants, the trustee, as he cannot be released from the liabilities of his situation, * cannot by any act *in pais* become the purchaser of [*490] the estate (*a*); but, if it be absolutely necessary that the property should be sold, and the trustee is ready to give more than any one else, he may institute proceedings in equity, and apply by motion, [or summons] to be allowed to purchase, and the Court will then examine into the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that inquiry will let another person prepare the particular of sale, and allow the trustee to bid (*b*); and, generally, if the Court can see clearly that under the circumstances of the case it would be for the benefit of the *cestuis que trust* that the trustee should purchase (as at a certain sum beyond what could be obtained

[(*e*) *Boswell v. Coaks*, 23 Ch. D. 302; reversed on other grounds, 27 Ch. D. 424.]

(*a*) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 801.

(*b*) *Campbell v. Walker*, 5 Ves. 681, 682, *per Lord Alvanley*.

[(*f*) 27 Ch. D. 454.]

elsewhere), the Court would sanction a sale to the trustee (c).

15. Of executors, administrators, assignees, &c. — The principles laid down with reference to *trustees for sale* are of course applicable to all who, though differing in name, are invested with the *like fiduciary character*, as executors and administrators (d), an executor in his own wrong (e), trustees for creditors (f), an agent (g), &c.; but a mortgagee may purchase from his mortgagor (h), surviving partners may purchase from the representatives of a deceased partner (i), [the trustee in the joint bankruptcy of surviving partners, who have a large claim against the estate of the deceased partner, may purchase from the representatives of the deceased partner (j),] and the creditor taking out execution is not precluded from becoming the purchaser of the property upon a sale by the sheriff (k); [and a person named as executor, but who, in fact, never proves the will, is not excluded from purchasing from the executor who proves (l).]

Secondly. As to the *terms* upon which the sale will be set aside.

[*491] * 1. *Cestui que trust* may recover the *specific estate*.

— The *cestui que trust*, if he chooses it, may have the specific estate reconveyed to him by the trustee (a), or,

(c) *Farmer v. Dean*, 32 Beav. 327.

(d) *Hall v. Hallet*, 1 Cox, 134; *Killick v. Flexney*, 4 B. C. C. 161; *Watson v. Toone*, 6 Mad. 153; *Kilbee v. Sneyd*, 2 Moll. 186; *Baker v. Carter*, 1 Y. & C. 250; and see *Naylor v. Winch*, 1 S. & S. 566.

(e) *Mulvany v. Dillon*, 1 B. & B. 408.

(f) *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, Id. 625, and the cases cited Id. 630, note (b); *Ex parte Bennett*, 10 Ves. 395, per Lord Eldon; *Ex parte Reynolds*, 5 Ves. 707; *Ex parte James*, 8 Ves. 346, per Lord Eldon; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Bage*, 4 Mad. 469; *Ex parte Badcock*, 1 Mont. & Mac. 231; *Pooley v. Quilter*, 2 De G. & J. 327.

(g) *King v. Anderson*, 8 I. R. Eq.

147, reversed Id. 625; *Murphy v. O'Shea*, 2 Jon. & Lat. 422.

(h) *Knight v. Majoribanks*, 11 Beav. 322; 2 Mac. & G. 10.

(i) *Chambers v. Howell*, 11 Beav. 6. As to purchases by one partner under an execution against another partner, see *Perens v. Johnson*, 3 Sm. & G. 419.

[(j) *Boswell v. Coaks*, 23 Ch. D. 302; reversed on other grounds, 27 Ch. D. 424.]

(k) *Stratford v. Twynam*, Jac. 418.

[(l) *Clark v. Clark*, 9 App. Cas. 733.]

(a) See *Ex parte James*, 8 Ves. 351; *Ex parte Bennett*, 10 Ves. 400; *Lord Hardwicke v. Vernon*, 4 Ves. 411; *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42.

where the trustee has sold it with notice, by the party who purchased (*b*), the *cestui que trust* on the one hand repaying the price at which the trustee bought, with interest at 4 per cent. (*c*), and the trustee or purchaser on the other accounting for the profits of the estate (*d*), but not with interest (*e*), and, if he was in actual possession, being charged with an occupation rent (*f*). [But if the consideration passing from the trustee is not wholly pecuniary, and the *cestui que trust* has by subsequent dealings put it out of his power to restore to the trustee the benefits derived from him, he has lost his right to set aside the transaction (*g*).]

2. **Allowances for repairs.** — The trustee will have all just allowances made to him for *improvements and repairs* which are substantial and lasting (*h*), or such as have a tendency to bring the estate to a better sale (*i*), as in one case for a mansion house erected, plantations of shrubs, &c. (*j*); and in estimating the improvements, the buildings pulled down, if they were incapable of repair, will be valued as old materials, but otherwise they will be valued as buildings standing (*k*). Should the property have been *deteriorated* by the acts of the trustee, his purchase-money will suffer a proportionate reduction (*l*). [And if the subject-matter of the sale be a business sold as a going concern, and the purchasing trustee carry it on under his own personal direction, on the sale being set aside he will be allowed to deduct from

(*b*) *Attorney-General v. Lord Dudley*, G. Coop. 146; *Dunbar v. Tredenick*, 2 B. & B. 304.

(*c*) *Watson v. Toone*, 6 Mad. 153; *Ex parte James*, 8 Ves. 351, per Lord Eldon; *Whelpdale v. Cookson*, stated from *R. L. Campbell v. Walker*, 5 Ves. 682; *Hall v. Hallet*, 1 Cox, 134, see 139; *York Buildings' Company v. Mackenzie*, *ubi supra*, &c.

(*d*) *Ex parte James*, 8 Ves. 351, per Lord Eldon; *Ex parte Lacey*, 6 Ves. 630, per *eundem*; *Watson v. Toone*, Mad. 153; *Whelpdale v. Cookson*, *York Buildings' Company v. Mackenzie*, *ubi supra*.

(*e*) *Macartney v. Blackwood*, 1 Ridg. Knapp & Sch. 602.

(*f*) *Ex parte James*, 8 Ves. 351, per Lord Eldon.

[(*g*) *Re Worssam*, 46 L. T. N. S. 584; *Dimsdale v. Dimsdale*, 3 Dr. 556, 577.]

(*h*) *Ex parte Hughes*, 6 Ves. 624, 625; *Ex parte James*, 8 Ves. 352; *Campbell v. Walker*, 5 Ves. 682; *Davey v. Durrant*, 1 De G. & J. 535; *King v. Anderson*, 8 I. R. Eq. 625, see 636.

(*i*) *Ex parte Bennett*, 10 Ves. 400.

(*j*) *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42.

(*k*) *Robinson v. Ridley*, 6 Mad. 2.

(*l*) *Ex parte Bennett*, 10 Ves. 401.

the profits all outgoings for wages of assistants, expenditure for stock, &c., but will not be allowed any salary for his own management of the business (m).]

[*492] *3. **Case of actual fraud.** — Where the contract is vitiated by the presence of *actual fraud*, allowance will still be made to the trustee for necessary repairs (a), and in one case allowance was also made for improvements (b); but in another case of actual fraud the Court refused any allowance for improvements. "If," said Lord Fitzgibbon, "a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, is he therefore to retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition I once heard at the bar, that the common equity of the country was to *improve the right owner out of the possession of his estate*" (c).

4. **Trustee paying purchase-money into Court.** — A trustee, the sale having taken place during the pendency of a suit, had paid part of his purchase-money into Court, which had been *invested in the funds*. On the purchase being set aside, the trustee claimed the benefit of the rise of the stock, but it was held that he was entitled only to his purchase-money with interest, for had there occurred a fall of the stock, he could not have been compelled to submit to the loss (d).

5. **Trustee to be discharged from the sale immediately.** — If the trustee is to be discharged from the situation of purchaser, he is to be discharged at once, and the Court will order an immediate re-conveyance upon immediate repayment of the money (e).

6. **Lessees not prejudiced.** — The re-conveyance of the estate will be without prejudice to the titles and interests of *lessees* and others who have contracted with the trustee *bonâ fide* before the pendency of the suit (f).

[(m) *Re Norrington*, 13 Ch. D. 654.]

(a) *Baugh v. Price*, 1 G. Wils. 320.

(b) *Oliver v. Court*, 8 Price, 172.

(c) *Kenney v. Browne*, 3 Ridg. 518; and see *Stratton v. Murphy*, 1 Ir. Rep. Eq. 361.

(d) *Ex parte James*, 8 Ves. 337, see 351.

(e) See *Ex parte Bennett*, 10 Ves. 400, 401.

(f) *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42; see the decree.

7. *Of submitting the estate to a re-sale.* — But the *cestui que trust*, particularly where the assignee in bankruptcy has become the purchaser, may claim, not a re-conveyance of the specific estate, but a *re-sale* of the property under the direction of the Court. The terms of the re-sale have not always been uniform. In *Whelpdale v. Cookson* (*g*), Lord Hardwicke said the majority of the creditors should *elect* whether the purchase should stand; so that should they elect to re-sell, and the estate should be sold at a still lower price, the creditors would suffer. The doctrine of Lord Thurlow appears to have been, that the property should be put up at the price at which the trustee purchased, and if any advance was made, the sale should take effect, * but [*493] if no bidding, the trustee should be held to his bargain (*a*). Lord Alvanley followed the authority of Lord Hardwicke, and directed an enquiry whether it was for the benefit of the infants that the premises should be re-sold, and, if for their benefit, that the sale should be made (*b*). “To this principle,” said Lord Eldon, “the objection is that a great temptation to purchase is offered to trustees, the question whether the re-sale would be advantageous to the *cestui que trust* being of necessity determined at the hazard of a wrong determination” (*c*). Lord Eldon therefore conceived it best to adopt the rule of Lord Thurlow, and so he decreed in *Ex parte Hughes* (*d*), and *Ex parte Lacey* (*e*). Sir W. Grant, in a subsequent case (*f*), said he was not aware that Lord Eldon had laid down any general rule as to the terms; but a few days after, having consulted the Lord Chancellor upon the subject, and discovering his mistake, he framed his decree in conformity with the Lord Chancellor’s decisions. The same principle has since been followed in numerous other cases (*g*), and the practice may be considered as settled.

(*g*) Cited *Campbell v. Walker*, 5 Ves. 682.

(*d*) 6 Ves. 617.

(*a*) See *Lister v. Lister*, 6 Ves. 633; *Ex parte James*, 8 Ves. 351.

(*e*) *Id.* 625; and see *Ex parte Reynolds*, 5 Ves. 707.

(*b*) *Campbell v. Walker*, 5 Ves. 678, see 682.

(*f*) *Lister v. Lister*, 6 Ves. 633.

(*c*) *Sanderson v. Walker*, 13 Ves. 603.

(*g*) *Ex parte James*, 8 Ves. 337; *Ex parte Bennett*, 10 Ves. 381; *Robinson v. Ridley*, 6 Mad. 2.

8. **Allowances for repairs, &c.**—Should the trustee have *repaired or improved* the estate, the expense of the repairs and improvements, if allowed, will be added to the purchase-money, and the estate be put up at the accumulated sum (*h*).

9. **Re-selling in lots.**—Where the trustee has purchased in one lot, the *cestuis que trust* cannot insist on a re-sale in different lots. If desirous of re-selling the property in that mode, they must pay the trustee his principal and interest, and then, as the absolute owners, they may sell as they please (*i*).

10. **Difficulty of Lord Hardwicke's rule.**—In the application of Lord Hardwicke's rule it was a question constantly occurring, whether the body of creditors at large could be bound by the resolution of the majority to insist upon a re-sale; but by the practice of Lord Eldon, the difficulty on that head is avoided (*j*), for as the creditors cannot by possibility sustain an injury, it is competent to any individual creditor to try the experiment (*k*).

[*494] *11. **The remedy against trustee who has sold the property.**—If before the *cestui que trust* commences proceedings for relief the trustee has passed the estate into the hands of a purchaser *without notice*, the *cestui que trust* may compel the trustee to account for the difference of *price* (*a*), or for the difference between the sum the trustee paid and the real *value* of the estate at the time of the purchase (*b*), with interest at 4 per cent. (*c*).

12. **Purchase of shares by a trustee.**—An administrator had become the purchaser of some shares in Scotch mines, part of the assets, and afterwards sold them to a stranger at a considerable advance of price, and Lord Thurlow decreed the trustee to account for every advantage he had made, but said he could not go the length of ordering the defendant to

(*h*) *Ex parte* Bennett, 10 Ves. 400; 400; S. C. 2 Cox, 320; Hall v. Hallet, 1 Cox, 134; Whichcote v. Lawrence, 3 Ves. 740; *Ex parte* Reynolds, 5 Ves. 707; Randall v. Errington, 10 Ves. 423.

(*i*) See *Ex parte* James, 8 Ves. 351, 352.

(*j*) *Ex parte* Hughes, 6 Ves. 624.

(*k*) *Ex parte* James, 8 Ves. 353; and see *Ex parte* Lacey, 6 Ves. 628.

(*a*) Fox v. Mackreth, 2 B. C. C. 139.

(*b*) See Lord Hardwicke v. Vernon, 4 Ves. 411.

(*c*) Hall v. Hallet, 1 Cox, 134, see

replace the shares. He conceived the plaintiff, one of the next of kin, had no such *election* of choosing between the *specific thing* and the *advantage* made of it (*d*).

13. *Costs*.—The *costs of the suit* will, as a general rule, follow the decree—that is, if the trustee be compelled to give up his purchase, unless his conduct was perfectly honourable and the sale is set aside on the mere dry rule of equity (*e*), he must pay the expenses he has himself occasioned (*f*); and if the charge be unfounded, the costs must be paid by the plaintiff. But if there be great delay on the part of the *cestui que trust*, the costs will be refused him, though he succeed in the suit (*g*); and, on the other hand, if the suit be dismissed, not because the transaction was not originally impeachable, but merely on account of the great interval of time, the Court may refuse to order the plaintiff to pay the costs of the defendant (*h*).

14. *Where the sale is set aside after the purchaser's death*.—If the *trustee* devise the estate purchased by him, and the purchase is set aside as against the devisee, it is conceived that as the devise carried all the testator's interest in the property the monies repaid will belong to the devisee. But if the *trustee* die *intestate*, then whether monies repaid shall belong to the next of kin or the heir of the trustee is a question of great difficulty. In favour of the former it may be urged, that as there is no equity between the heir-at-law and next of kin, the monies repaid being in fact personal estate must belong to the next of kin: that the Court rescinds the transaction by taking an account of rents and *allowing 4 per cent. interest on the purchase-money [*495] from the time of the purchase, and that the rents and interest accrued during the life of the intestate must certainly be regarded as personal estate, and that the right of the next of kin is supported by *Lawes v. Bennett* (*a*), and other cases,

(*d*) S. C.

(*e*) *Baker v. Carter*, 1 Y. & C. 250.

(*f*) *Whitchote v. Lawrence*, 3 Ves. 752; *Hall v. Hallet*, 1 Cox, 141; *Sanderson v. Walker*, 13 Ves. 601, 604; *Crowe v. Ballard*, 2 Cox, 253; S. C. 3 B. C. C. 117; *Dunbar v. Tre-*

dennick, 2 B. & B. 304; *Smedley v. Varley*, 23 Beav. 358.

(*g*) *Attorney-General v. Lord Dudley*, G. Coop. 146.

(*h*) *Gregory v. Gregory*, G. Coop. 201.

(*a*) 1 Cox, 167.

where a lessee has an option of purchasing and the option is exercised after the death of the lessor, in which case there is a retrospective conversion. On the other hand, it may be argued that a purchase by a trustee is not void but voidable only, and that the heir is clearly not bound to account for the rents while he was in possession, and that the Court takes an account of rent and interest *ab initio*, not for the purpose of increasing the trustee's personal estate, but for measuring the price which the *cestui que trust* must pay for recovering the estate: that the heir takes all the title which the intestate could give him, subject to an equity subsisting in another to wrest the estate from him upon certain terms, and that the monies repaid are in fact the estate, after satisfying the outstanding claims: that the cases decided upon contract have no application, as the monies are here repaid contrary to the contract: that a different doctrine would lead to great inconvenience in adjusting the accounts of rent and interest, and also from intermediate settlements or other dispositions by the heir; it would be very hard, for instance, that purchasers under a marriage settlement, with constructive notice, should, because they cannot have the whole benefit, be deprived of every benefit. The inclination of the author's opinion is in favour of the real representative, but the point remains to be decided.

Thirdly, As to the time within which the sale may be set aside.

1. **Cestui que trust must set aside the sale in reasonable time.**—If the *cestui que trust* desire to set aside the purchase, he must make his application to the Court in *reasonable time*, or he will not be entitled to relief (*b*). A long acquiescence under a sale to a trustee is treated as evidence that the relation between the trustee and *cestui que trust* had been previously abandoned, and that in all other respects the purchase was fairly conducted (*c*).

(*b*) *Campbell v. Walker*, 5 Ves. 680, 682, *per* Lord Alvanley; *Chalmer v. Bradley*, 1 J. & W. 59, *per* Sir T. Plumer; *Ex parte James*, 8 Ves. 351, *per* Lord Eldon; *Webb v. Rorke*, 2 Sch. & Lef. 672, *per* Lord Redesdale; *Randall v. Errington*, 10 Ves. 427, *per* Sir W. Grant. But see *Baker v. Peck*, 9 W. R. 186.

(*c*) *Parkes v. White*, 11 Ves. 226, *per* Lord Eldon; and see *Morse v. Royal*, 12 Ves. 374, 378.

2. **What considered a reasonable time.**—A sale cannot, in general, be set aside after a lapse of twenty years (*d*); but in these cases the Court does not confine itself to that period by analogy to the Statute of Limitations, for relief *has been refused after an acquiescence of [*496] eighteen years (*a*); and seventeen years (*b*); and it is presumed that even a shorter period would be a bar to the remedy, where the *cestui que trust* could offer no excuse for his *laches* (*c*). However, the sale has been opened after an interval of ten years (*d*), and eleven years (*e*); and even after a much greater lapse of time where the executor had purchased in the names of trustees for himself, and the transaction was attended with circumstances of disguise and concealment (*f*).

3. **Of persons under disability.**—Persons not *sui juris*, as *femes covert* and infants, cannot be precluded from relief on the ground of acquiescence during the continuance of the disability (*g*). But *femes covert* as to property settled to their *separate use*, [or belonging to them as their separate property under the Married Women's Property Act, 1882 (*h*),] if their power of anticipation be not restricted, are regarded as *femes sole* (*i*).

4. **Time allowed to a class of persons.**—A class of persons, as *creditors*, cannot be expected in the prosecution of their common interest to exert the same vigour and activity as *individuals* would do in the pursuit of their exclusive rights (*j*).

(*d*) *Price v. Byrn*, cited *Campbell v. Walker*, 5 Ves. 681; *Barwell v. Barwell*, 34 Beav. 371.

(*a*) *Gregory v. Gregory*, G. Coop. 201, affirmed on appeal, see Jac. 631; *Champion v. Rigby*, 1 R. & M. 539; *Roberts v. Tunstall*, 4 Hare, 267; *King v. Anderson*, 8 I. R. Eq. 625.

(*b*) *Baker v. Read*, 18 Beav. 398.
(*c*) See *Oliver v. Court*, 8 Price, 167, 168.

(*d*) *Hall v. Noyes*, cited *Whichcote v. Lawrence*, 3 Ves. 748; [and see *Re Worssam*, 46 L. T. N. S. 584.]

(*e*) *Murphy v. O'Shea*, 2 Jon. & Lat. 422.

(*f*) *Watson v. Toone*, 6 Mad. 158.

(*g*) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601; *Roche v. O'Brien*, 1 B. & B. 330, see 339.

[(*h*) 45 & 46 Vict. c. 75.]

(*i*) See *infra*.

(*j*) *Whichcote v. Lawrence*, 3 Ves. 740, see 752; *Ex parte Smith*, 1 D. & C. 267; *Hardwick v. Mynd*, 1 Anst. 109; [*Boswell v. Coaks*, 27 Ch. D. 424;] and see *Kidney v. Coussmaker*, 12 Ves. 158; *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42; *Ex parte Smith*, 1 D. & C. 267.

Accordingly creditors have succeeded in their suit after a *laches* of twelve years (*k*); but even creditors will be barred of their remedy if they be chargeable with very gross *laches*, as with acquiescence in the sale for a period of thirty-three years (*l*).

5. **Time no bar where circumstances not known.** — For *laches* to operate as a bar, it must be shown that the *cestui que trust* knew the trustee was the purchaser; for while the *cestui que trust* continues ignorant of that fact, he cannot be blamed for not having quarrelled with the sale (*m*).

6. **Distress of cestui que trust.** — The effect of the length of time may also be materially influenced by the continued *distress* of the *cestui que trust* (*n*), but *poverty is merely an ingredient in the case, and will not alone displace the bar (*a*).

7. **Confirmation of the sale.** — Of course the *cestui que trust* may ratify the sale to the trustee by an express and actual confirmation (*b*); and if the *cestui que trust* choose to confirm it, he cannot afterwards annul his own act on the ground of no adequate consideration (*c*). But —

a. Requisites of good confirmation. — The confirming party must be *sui juris* — not labouring under any disability, as infancy or coverture (*d*). But, in the case of real estate a *feme covert* can, if it be not settled to her separate use without anticipation, confirm the purchase under the operation of the Fines and Recoveries Act (*e*). And in confirmation, as in acquiescence, a *feme covert* who has property, whether real or personal, settled to her separate use, [or belonging to her as her separate property under the recent Act (*f*),]

(*k*) Anon. case in the Exchequer, cited *Lister v. Lister*, 6 Ves. 632.

(*l*) See *Hercy v. Dinwoody*, 2 Ves. jun. 87; *Scott v. Nesbitt*, 14 Ves. 446.

(*m*) *Randall v. Errington*, 10 Ves. 423, see 427; *Chalmer v. Bradley*, 1 J. & W. 51.

(*n*) *Oliver v. Court*, 8 Price, 127; see 167, 168; and see *Gregory v. Gregory*, G. Coop. 201; *Roche v. O'Brien*, 1 B. & B. 342.

(*a*) *Roberts v. Tunstall*, 4 Hare, 257; see p. 267.

(*b*) *Morse v. Royal*, 12 Ves. 355; *Clarke v. Swaile*, 2 Eden, 134; and see *Chesterfield v. Janssen*, 2 Ves. 125; S. C. 1 Atk. 301.

(*c*) *Roche v. O'Brien*, 1 B. & B. 353, per Lord Manners.

(*d*) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601; *Roche v. O'Brien*, 1 B. & B. 330, see 339; and see *Scott v. Davis*, 4 M. & Cr. 92.

(*e*) 3 & 4 W. 4, c. 74; and see 8 & 9 Vict. c. 106.

[(*f*) 45 & 46 Vict. c. 75.]

(provided her power of anticipation be not restrained), has, to the extent of her interest in the property, all the capacity of a *feme sole* (*g*).

β. The confirmation must be a solemn and deliberate act, not, for instance, fished out from loose expressions in a letter (*h*); and particularly where the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the Court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence (*i*).

γ. There must be no *suppressio veri* or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case (*j*).

δ. It has been laid down that the confirming party must not be ignorant of the *law*, that is, he must be aware that the transaction is of such a character that he could impeach it in a Court of Equity (*k*); but it may be doubted whether this view is consistent * with the established doctrine, [*498] that mistake of *law* as distinguished from mistake of *fact* forms no ground for relief (*a*).

ε. The confirmation must be wholly distinct from and independent of the original contract (*b*) — not a conveyance of the estate executed in pursuance of a covenant in the original deed for further assurance (*c*).

(*g*) See *infra*.

(*h*) *Carpenter v. Heriot*, 1 Eden, 338; and see *Montmorency v. Devereux*, 7 Cl. & Fin. 188.

(*i*) *Morse v. Royal*, 12 Ves. 373, *per* Lord Erskine.

(*j*) See *Murray v. Palmer*, 2 Sch. & Lef. 486; *Baugh v. Price*, 1 G. Wils. 320; *Morse v. Royal*, 12 Ves. 373; *Cole v. Gibson*, 1 Ves. 507; *Roche v. O'Brien*, 1 B. & B. 338, and following pages; *Adams v. Clifton*, 1 Russ. 297; *Cockerell v. Cholmeley*, 1 R. & M. 425; S. C. Taml. 444; *Chesterfield v. Janssen*, 2 Ves. 146, 149, 152, 158; *Chalmer v. Bradley*, 1 J. & W. 51.

(*k*) See *Cann v. Cann*, 1 P. W. 727; *Dunbar v. Tredennick*, 2 B. & B. 317; *Burney v. Macdonald*, 15 Sim.

15; *Molony v. L'Estrange*, 1 Beat. 413; *Crowe v. Ballard*, 2 Cox, 357; S. C. 1 Ves. jun. 220; S. C. 3 B. C. C. 120; *Watts v. Hyde*, 2 Coll. 377; *Cockerell v. Cholmeley*, 1 R. & M. 425; *Murray v. Palmer*, 2 Sch. & Lef. 486; *Roche v. O'Brien*, 1 B. & B. 339; *Ex parte James*, 9 L. R. Ch. App. 609.

(*a*) *Midland Great Western Railway of Ireland Company v. Johnson*, 6 H. L. Cas. 798; and see *Stafford v. Stafford*, 1 De G. & J. 202; *Stone v. Godfrey*, 5 De G. M. & G. 76; *Re Saxon Life Assurance Company*, 2 J. & H. 412.

(*b*) See *Wood v. Downes*, 18 Ves. 128; *Morse v. Royal*, 12 Ves. 373; *Scott v. Davis*, 4 M. & Cr. 91, 92; *Roberts v. Tunstall*, 4 Hare, 267.

(*c*) *Roche v. O'Brien*, 1 B. & B.

ς. The confirmation must not be wrung from the *cestui que trust* by distress or terror (*d*).

ζ. Where the *cestuis que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest, but the confirmation to be complete, must be the joint act of the whole body (*e*).

330, see 338; *Wood v. Downes*, 18 Ves. 120, see 123; and see *Fox v. Mackreth*, 2 B. C. C. 400.

(*d*) See *Roche v. O'Brien*, 1 B. & B. 330; *Dunbar v. Tredennick*, 2 B. & B. 317; *Crowe v. Ballard*, 2 Cox, 257.

(*e*) Sir G. Colebrooke's case, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, Id. 628; the cases cited, Id. 630, note (*b*). *Whelpdale v. Cookson*, cited *Campbell v. Walker*, 5 Ves. 682, has been doubted by Lord Eldon, 6 Ves. 628.

DUTIES OF TRUSTEES FOR PURCHASE.

A TRUST for *purchase* is not so frequent as a trust for *sale*, and yet occurs often enough to merit a separate consideration.

1. **Trustees liable for consequences of breach of duty.**—The general rule is that trustees for purchase, like all other trustees, are bound to discharge the duty prescribed, and failing to do so are answerable for the consequences; as, if a specific fund be bequeathed to trustees upon trust to lay out on a purchase, and they neglect to call in the fund and lay it out, they are liable to compensate the *cestuis que trust* for the consequences (a).

2. **May enter into a previous contract.**—It is almost unnecessary to premise, that trustees for purchase are not confined to the mere act of *paying* the purchase-money and taking a *conveyance*, but may in the ordinary course of business, enter into a previous written *contract* as a preliminary to the purchase.

3. **Must see to value.**—A material point to which trustees of this kind have to advert is the intrinsic *value* of the estate proposed to be bought, and, to arrive at a sound conclusion on this head, they must employ a valuer of their own (b), and must not rely upon any valuation made on behalf of the vendor; “nothing,” said Lord Romilly, “is more uncertain than a valuation, and the Court has constantly to observe upon the great discrepancy between valuations made by those persons who want to enhance, and by those persons who want to depreciate the value of the property. A man

(a) *Craven v. Craddock*, W. N. 1868, p. 229.

[(b) In *Fry v. Tapson*, 28 Ch. D. 268; it was held that the appointment of the valuer could not be left

to the trustees' solicitor, but that the trustees were bound to exercise their own judgment as to the selection of a valuer.]

bond fide forms his opinion, but he looks at the case in a totally different way, when he knows on whose behalf he is acting;” and in reference to the case of a loan by trustees on mortgage (but which is not on principle distinguishable from a sale) he added, “a trustee cannot with propriety lend trust money on mortgage upon a valuation made by or on behalf of the mortgagor. If he does so, and the valuer has *bond fide* valued the property at double its value, the [*500] trustee must take * the consequences: he ought to have employed a valuer on his own behalf to see to it” (a).

4. **There must be a good title.**— Another question of importance is that of *title*. Every direction or authority to lay out trust money upon a purchase of real estate, carries with it the tacit condition that there shall be a good title. Whether, therefore, the trustees are proposing to purchase by *private contract* or by *auction*, they must take care not to bind themselves by any agreement which shall preclude them from requiring a good marketable title. If the intended contract or conditions of sale contain anything of a special character, the trustees should lay them before their counsel for his opinion, whether the stipulations are consistent with their trust (b). Formerly a good marketable title was one traced back for a period of sixty years, but by 37 & 38 Vict. c. 78, s. 1, a forty years’ title has now been substituted.

[5. **Conditions incorporated in the contract.**— The 2d section of the same Act as to contracts for sale made after the 31st December 1874, and the 3d section of The Conveyancing and Law of Property Act, 1881 (c) as to contracts for sale made after the 31st December 1881, incorporate in such contracts various conditions and stipulations (d) unless the same are expressly excluded, and by the 3d section of the

(a) *Ingle v. Partridge*, 34 Beav. 412-414; [but see *Re Godfrey*, 23 Ch. D. 483, where trustees were held not liable though they had not made an independent valuation, and in all cases the true test seems to be whether the trustees have acted as prudent men would in dealing with their own prop-

erty; and see *Re Pearson*, 51 L. T. N. S. 692.]

(b) See *Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 363.

[(c) 44 & 45 Vict. c. 41.]

[(d) For these conditions and stipulations see *ante*, p. 438-440.]

former Act and the 66th section of the latter Act trustees who are purchasers are authorised to buy without excluding the application of the Acts, and the 66th section of the latter Act expressly exonerates trustees and their solicitors from all liability for so doing, but nothing in that Act is to be taken to imply that the adoption in connection with or application to any contract or transaction of any further or other provisions, stipulations, or words is improper.

6. **Official searches.**—Sect. 2 of The Conveyancing Act, 1882 (*e*) provides for an official search being made on the request of a purchaser for entries of judgments, Crown debts, and similar matters, and provides that when a solicitor acting for trustees obtains an office copy certificate of the result of the search under the section, the trustees shall not be answerable for any loss that may arise from error in the certificate.

7. **Yorkshire Register.**—As to lands situate in Yorkshire, “The Yorkshire Registries Act, 1884,” (*f*) provides for an official search of the register being *made at [*501] the request of any person, and further exempts any trustee, executor, or other person in a fiduciary position who has obtained a certificate of the result of an official search or a certified copy of any document enrolled in the register, or of any entry in the register from any loss, damage, or injury that may arise from any error in such certificate or copy. And where a deed or will has been enrolled at full length, the comparison of an abstract with the copy so enrolled is to be a sufficient discharge of the duty to compare the abstract with the original document.]

8. **Deposit.**—As a *deposit* is almost invariably required upon a sale by auction, and not uncommonly by private contract, it is conceived that trustees would be justified upon signing the contract in paying a deposit in part discharge *de bene esse* of the purchase-money. But generally the character of trustee is pleaded as an excuse for not paying a deposit, and is allowed.

9. **Where purchase-money is in Court.**—Where the money is in *Court* the trustee must enter into a *conditional contract*,

[*e*] 45 & 46 Vict. c. 39.]

[*f*] 47 & 48 Vict. c. 54, ss. 20, 23.]

that is, "subject to the approbation of the Court," and then apply by petition or summons at chambers for the Court's sanction, and the practice is to direct an inquiry whether the proposed purchase is fit and proper, and if so, whether a *good title* can be made. "As long," said Sir G. Jessel, "as an estate is under the administration of the Court, the Court does not allow a purchase or mortgage or any other investment to be made, without seeing to its safety. The Court has to protect the property for all claimants, and a reference is made to ascertain the propriety of the investment, that is to say, its propriety in all respects" (a). And the practice is not to inquire whether a good title can be made *subject to the conditions*, but whether a good title can be made *absolutely*, and if in the course of investigation an objection to the title arises, it is brought under the attention of the judge, who then exercises his discretion (the whole title being before him), whether the objection can be waived with reasonable safety (b). "Much too great laxity," observed V. C. Wood, "has been gaining ground amongst the advisers of those who have to manage trust property, and there is a disposition to rest satisfied with imperfect titles. I cannot approve of such a practice, and cannot permit trustees to take a defective title, even though it may be in accordance with the contract" (c).

10. **How purchase will affect the interest of cestuis que trust.** — Trustees for purchase have to look not only [*502] to the adequacy of *the *value* and the goodness of the *title*, but also to the effect which the purchase will have upon the *relative interests* of the *cestuis que trust*.

Purchase of houses. — Thus where the property is directed by the settlement to be held in trust for a person for life with remainders over, a trustee might no doubt purchase an estate with a suitable *house* upon it, but (without saying that he could not legally do so) he ought not to purchase a house merely. This is a property of a

(a) *Bethell v. Abraham*, 17 L. R. Eq. 27.

(c) *Ex parte The Governors of Christ's Hospital*, 2 H. & M. 168.

(b) *Ex parte The Governors of Christ's Hospital*, 2 H. & M. 166.

wasting nature, and the tenant for life could not be compelled to preserve it against natural decay. A power to invest on *Government Annuities* would not justify the purchase of *Long Annuities*, and there is a similar difference between land and houses, the former being worth about thirty years purchase, and the latter much less, so that the tenant for life would be benefited at the expense of the remainderman (a).

11. **Ground rents.**—Even a purchase of *ground rents* of houses, though coming under the description in the trust deed of “hereditaments,” is not free from objection, for the object would of course be to procure for the tenant for life a higher income, but this would be at the cost of the remainderman in point of security. Should the houses be burnt down, and should the lessee have neglected to insure or the insurance monies not be forthcoming, the trustee might have nothing to show for the purchase but a worthless site, and then the remainderman might seek to hold him responsible as for a fraudulent execution of his trust in equity, though the purchase was within the words of the trust according to the letter (b). However, it has been held that the purchase of freehold ground rents reserved upon building leases for ninety-nine years is justifiable under a power to purchase “hereditaments in fee-simple in possession” (c).

12. **A timbered estate.**—Again, if a sum be given to be laid out in the purchase of an estate to be settled on a person for life *without impeachment of waste*, with remainders over, trustees should not purchase a *wood estate*, as the tenant for life, on being put into possession, could by a fall of the timber possess himself of a great part of the capital or *corpus* of the fund (d); and, on the contrary, if the tenant for life were *impeachable for waste*, he would lose the fruit of so much as was the value of the timber (e). But trustees may purchase an estate where the timber forms no over-

(a) See *Moore v. Walter*, 8 L. T. N. S. 448.

(b) See *Read v. Shaw*, Sugd. Powers, Append. 963; and see *Ib.* p. 864, 8th ed.; and *Middleton v. Pryor*, Amb. 393.

(c) *Re Peyton's Settlement*, 7 L. R. Eq. 463.

(d) See the subject discussed in *Burges v. Lamb*, 16 Ves. 174.

[(e) But see now 45 & 46 Vict. c. 38, s. 35, under which a tenant for life

[*503] whelming proportion of the value, * for it cannot be supposed that the trustees were meant to purchase land without trees upon it.

13. **Mines.** — Trustees again should not purchase *mines*; for if the mines be open, the tenant for life might exhaust them, and leave nothing to the remainderman; and if not open, the tenant for life, if impeachable for waste, would get nothing and the remainderman would take the whole (a). But under *special circumstances* the Court has sanctioned the purchase of mines (b).

14. **Advowsons.** — *Advowsons* again would be very undesirable as a purchase, for though the advowson or any particular presentation (before a vacancy) might be sold, there would be no annual or regular fruit. The remainderman, *after* the tenant for life's death, might sell the advowson and get back all he was entitled to; but in the meantime the tenant for life would be reaping no benefit.

15. **Copyholds for lives.** — Copyholds for *lives*, if customarily renewable, might substantially be equal to freeholds, but they would not fall within the terms of a trust to purchase estates of *inheritance* (c).

16. **Trustees buying from one of themselves.** — Trustees having a trust or power to purchase must exercise a *joint* discretion as to the propriety of the purchase, and, therefore, as no man can be judge in his own case, they are precluded from buying from one of themselves. If such a purchase be really desirable, it might be carried out by a friendly suit for obtaining the sanction of the Court.

17. **Consent of tenant for life.** — A trust or power to purchase is sometimes accompanied with a condition that it shall be with the *consent of the tenant for life*. In such a

impeachable for waste in respect of timber may cut and sell ripe timber and will be entitled to one-fourth of the proceeds.]

[(a) But see now 45 & 46 Vict. c. 38, ss. 6-11, under which the tenant for life whether impeachable for waste or not may grant mining leases and will be entitled to one-fourth or three-

fourths of the mineral rents as the case may be.]

(b) *Bellot v. Littler*, W. N. 1874, p. 156.

(c) *Trench v. Harrison*, 17 Sim. 111. N. B. The words "of inheritance" in the marginal note, do not occur in the statement of the settlement in the body of the Report, but seem to be implied.

case can the trustees purchase from the tenant for life himself? It is now settled that trustees with a similar power of sale and exchange can either sell to or exchange with the tenant for life (*d*), but this has always been regarded as hardly defensible on principle, and as an exception to the general rule. An exchange is in substance nothing more than a mutual sale, and when the simple case of a purchase by trustees from a tenant for life with power of consenting comes before the Court, it may be upheld, but in the meantime it would not be prudent for trustees, before actual decision, to incur the risk.

18. **Equity of redemption.**—Trustees, without a special power for the purpose, ought not * to purchase [*504] an *equity of redemption* merely (*a*), for the mortgagee might seek to foreclose, when there might be a difficulty of redeeming, or might sell over the heads of the trustees under the power of sale, or might consolidate his mortgage with some other mortgage on another estate of the mortgagor, and so oblige the trustees to redeem both.

19. **Should always get the legal estate.**—It would not be too much to lay down the rule broadly that trustees should never purchase without getting the *legal estate*.

20. **Repairs and improvements.**—A trust to buy an estate will not justify the investment of part of the trust fund upon a purchase, and the expenditure of a further part upon *repairs and improvements* however substantial either of the purchased estate (*b*), or of an estate settled to the like uses (*c*). But in a recent case where money was bequeathed

(*d*) *Howard v. Ducane*, T. & R. 81.

[(*a*) *Ex parte Craven*, 17 L. J. N. S. Ch. 215; *Re Galbraith*, 10 I. R. Eq. 368, where the Court held that monies paid into Court under the Lands Clauses Consolidation Act, 1845, ought not to be re-invested in the purchase of an equity of redemption.]

(*b*) *Bostock v. Blakeney*, 2 B. C. C. 653; *Drake v. Trefusis*, 10 L. R. Ch. App. 364.

(*c*) *Dunne v. Dunne*, 3 Sm. & G. 22; *Brunskill v. Caird*, 16 L. R. Eq. 493.

But the Court by a liberal construction of the Lands Clauses Consolidation Act, and the Leases and Sales of Settled Estates Act has assumed the jurisdiction of applying money stamped with a trust for purchase of real estate, in the improvement of estates settled to the uses of the estates directed to be purchased. See *Re Clitheroe's Trust*, W. N. 1869, p. 26; *Re Johnson's Trust*, 8 L. R. Eq. 348; *Re Incumbent of Whitfield*, 1 J. & H. 610; *Re Dummer's Will*, 2 De G. J. & S. 515; *Ex parte Rector of*

to be laid out on a purchase of land to be annexed to a settled estate, and part of the settled estate was the advowson of a rectory of which the parsonage house was so dilapidated as to require rebuilding, which the testator had contemplated, V. C. Malins held that the proposed expenditure was within the spirit of the trust, and that the trustee would be justified in applying a competent part of the trust fund for the purpose (*d*). And monies liable to be laid out on a purchase of lands to be settled to certain uses may be laid out in the erection of *new buildings*, though not in the *repair of old buildings* on the lands settled to those uses (*e*), [or in draining the lands in settlement (*f*)].

[*505] *21. Now, by the Settled Land Act, 1882, sect. 33, money in the hands of trustees, and liable to be laid out in the purchase of land to be made subject to the settlement, may, at the option of the tenant for life, be invested or applied as capital money arising under the Act, and under this it may be made applicable for the improvements authorised by the Act (*a*).]

22. *Estates in possession.*—When the trust is to purchase an estate “*in possession*,” it would not be competent to trustees to buy an *estate in reversion*; but, as already observed, under a power to purchase “hereditaments in fee simple in possession,” trustees may buy ground-rents reserved upon building leases for ninety-nine years (*b*). But where the leases are of short duration, and the ground-rents are low as compared with the rental of the property when

Claypole, 16 L. R. Eq. 574; [*Re Speer's Trust*, 3 Ch. D. 262;] and see *Re Leigh's Estate*, 6 L. R. Ch. App. 887; *Re Newman's Settled Estates*, 9 L. R. Ch. App. 681; *Drake v. Trefusis*, 10 L. R. Ch. App. 366; *Re Hurle's Settled Estates*, 2 H. & M. 193. [But see *Re Venour's Settled Estates*, 2 Ch. D. 522, 526.]

(*d*) *Re Lord Hotham's Trusts*, 12 L. R. Eq. 76; *Re Curzon's Trust*, V. C. Malins, 8 May, 1874. But see *Brunskill v. Caird*, 16 L. R. Eq. 495, and *Re Nether Stowey Vicarage*, 17 L. R. Eq. 156.

(*e*) *Drake v. Trefusis*, 10 L. R. Ch. App. 364; [*Re Leslie's Settlement Trusts*, 2 Ch. D. 185; *Re Lytton's Settled Estates*, W. N. 1884, p. 193; *Re Stock's Devised Estates*, 42 L. T. N. S. 46; and see *Donaldson v. Donaldson*, 3 Ch. D. 743.]

(*f*) *Re Leslie's Settlement Trusts*, *ubi sup.* [As to improvements under the Settled Land Act, see *post*, Chap. xxii.]

[(*a*) See *post*, Chap. xxii.]

(*b*) *Re Peyton's Settlement*, 7 L. R. Eq. 463.

it falls into possession, the purchase of the ground-rents would be for the advantage of the remaindermen at the expense of the tenant for life.

23. **Fund in Court.** — Where the trust fund is in Court, it is still the duty of the trustees to watch the administration, and see that the purchase is a proper one, unless all the beneficiaries, whether under disability or not, are before the Court, and then the *cestuis que trust* by themselves or their guardians can look after their own interests, and the trustees are exonerated (c).

24. **Costs.** — The *costs* of the purchase are to be considered as part of it, and will come out of the same fund. The trustees, therefore, should provide for the costs, as well as for the purchase-money, though if this were not done, they would still have a lien for the costs properly incurred upon the estate purchased (d).

25. **Whether trust to be disclosed.** — The trustees, where the money is not under administration by the Court, need not *disclose the trust* to the vendor, either in the contract or in the conveyance. If they do so, it will embarrass the vendor by obliging him to see that the purchase-money is properly applied in pursuance of the trust.

26. **Declaration of trust.** — Where the legal estate is required to be vested in the *trustees*, they should, contemporaneously with the completion of the purchase, execute a formal declaration of trust, either by indorsement on the conveyance or by a separate instrument with notice of it indorsed on the conveyance, as otherwise the survivor would have it in his power to deal with the property as his own. Where notice of the trust to the vendor cannot be avoided, the declaration of trust may be embodied in the conveyance itself.

This to some *extent lengthens the conveyance, [*506] and the vendor might in strictness claim the extra costs; but such a claim is very seldom, if ever, heard of in practice.

27. **Consequences of no declaration of trust.** — A *declaration of trust*, or some notice tantamount to it, not only obvi-

(c) *Davis v. Combermere*, 9 Jur.

(d) *Gwyther v. Allen*, 1 Hare, 505.

ates fraud on the part of the trustee, but is also desirable on another account. If the estate purchased be not ear-marked at the time as subject to the trust, serious questions might afterwards arise between the *cestuis que trust* and the representatives of the trustee, who are the persons entitled to the property, viz., whether the estate was purchased with the trust fund or from the trustee's private resources, and the evidence upon this issue might entail infinite expense (a).

[28. **Trustee providing part of purchase-money.**—Where an estate is purchased by trustees, but, the trust funds being insufficient to provide the whole purchase-money, one of the trustees provides the sum necessary to complete the purchase, the trust estate is entitled to a first charge upon the estate for the amount of the trust fund, and subject to such charge the trustee is entitled to be indemnified out of the estate in respect of the sum provided by him, and subject to such indemnity the real estate belongs to the trust (b).]

29. **Whether the settlement should be in the conveyance.**—Where the legal estate is not required to be vested in the trustees, but is to be limited *to the use of the beneficiaries*, the first question is, whether the limitations should be inserted in the conveyance itself, or whether the conveyance should be to the trustees, and a settlement executed subsequently. The answer must depend on the particular circumstances of each case, and whether the vendor will or not offer any objection, though it is conceived that on the purchaser undertaking to pay any extra costs to be thereby occasioned, the vendor could not object.

30. **Whether to be referential.**—Another practical question is, whether the limitations of the settlement to which the new purchase is to be subjected should be set out at length, or be *incorporated by reference*. In either case the trustees must be careful to ascertain the facts, as whether the owners of the successive estates have in any and what way dealt with their respective interests.

31. **Form of referential settlement.**—If it be proposed to

(a) See *Mathias v. Mathias*, 3 Sm. Beav. 507, and see *post*, Chap. xxx. & G. 552; *Price v. Blakemore*, 6 s. 2.

[(b) *Re Pumfrey*, 22 Ch. D. 255.]

settle the property by *referential* words, caution must be used so as to preserve the rights of the beneficiaries intact. Suppose, for instance, the trustees of a marriage settlement of real estate had disposed of it under a power of sale * and had laid out the proceeds in the purchase [*507] of another estate, and then granted the new property to A. and his heirs "to the uses and upon the trusts," &c., of the original settlement. If in this case a term of years was limited by the original settlement to trustees, and they are dead, no new term will be created, or if any tenant for life or remainderman had sold his interest, he would, nevertheless, take the like estate again, and the purchaser could have only an equity. It is impossible to provide *à priori* any form that would adapt itself to all cases; but the following, which was settled by two eminent conveyancers, in a case where part of the settled estates had been sold and the proceeds re-invested, may be usefully inserted. The *habendum* was "to such uses as under and by virtue of the said indenture of settlement are now subsisting in the thereby settled hereditaments (now remaining unsold), and so that the said hereby assured hereditaments shall upon the execution of these presents be vested in the persons in whom the said thereby settled hereditaments (now remaining unsold) are now vested, and for the same estates and interests as are now vested in those persons respectively in the same hereditaments under or in consequence of that indenture, and shall be subject to the same trusts, powers and provisions as the said thereby settled hereditaments (now remaining unsold) are now subject to or affected by, under or in consequence of the same indenture, and so as to give effect to, but so as not to multiply or increase any charge subsisting under that indenture or thereby authorized to be created."

32. **Directions for settlement.**— It has hitherto been assumed that the directions for the limitations in the settlement are clear in themselves, but it often happens that the trustees are involved in considerable perplexity from the ambiguity of the language in which the directions are given. We have to some extent anticipated this subject in a former page, under the general head of "executory trusts" (which comprise

trusts for purchase and settlement) (a), but some further observations may here be introduced, with reference to the particular branch of executory trusts now under consideration.

33. **Impeachment for waste.** — When trustees have to settle the estate upon a person for life with remainders over or in strict settlement, the question at once suggests itself whether the tenant for life is or not to be made *impeachable for waste*. The *prima facie* rule appears to be that he shall (b), but there are important exceptions. Thus, where a larger estate than for life is given in the first instance, but it is afterwards [*508] cut down by directions for a strict settlement, the Court does not consider itself justified in reducing the interest first taken beyond the clear intention, but limits a life estate without impeachment for waste (a). Again, where a testator directed a settlement to be made on A. and the heirs of his body (which would have left him tenant in tail), and then added that "it was never to be in the power of A. to dock the entail during his life," A. was declared to be tenant for life without impeachment of waste (b). And the like construction prevailed where a testator constituted A. "his heir," but desired that it should "be secured for the benefit of A.'s family" (c). Again, where a testator directed the property to be "closely entailed," the Court cut it down to a tenancy for life with remainder to the issue, but exempted the tenant for life from impeachment for waste (d).

34. **"To be strictly settled."** — In another case, where the direction was that the estate should be "*strictly settled*," the limitation to the tenant for life was without impeachment for waste (e), and V. C. Wood observed, with reference to

(a) See *ante*, p. 113.

(b) *Davenport v. Davenport*, 1 H. M. 775; *Stanley v. Coulthurst*, 10 L. R. Eq. 259.

(a) *Davenport v. Davenport*, 1 H. & M. 779, *per* V. C. Wood; *Sackville-West v. Viscount Holmesdale*, 4 L. R. H. L. 543.

(b) *Leonard v. Sussex*, 2 Vern. 526.

See 1 H. & M. 778.

(c) *White v. Briggs*, 15 Sim. 17 & 300.

(d) *Woolmore v. Burrows*, 1 Sim. 512. See 1 H. & M. 778.

(e) *Banks v. Le Despencer*, 10 Sim. 576; 11 Sim. 508; and see *Loch v. Bagley*, 4 L. R. Eq. 122.

this decision, that it was sustainable on the ground that the term "strict settlement" without more was understood in accordance with the common form of such instruments to imply estates for life without impeachment of waste (f).

35. **Concurrence of all the cestuis que trust.** — If the parties beneficially interested are under no disability and can agree together as to the disposition of the fund before investment or of the estate after investment, the trustees will be bound to obey their joint wishes, and must deal with the property in the manner directed by their joint order.

(f) *Davenport v. Davenport*, 1 H. & M. 779.

DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS.

UNDER this head we shall treat, — *First*, Of the *validity* of a trust for payment of debts; *Secondly*, What creditor deeds are *revocable*; and *Thirdly*, Of the *duties* of trustees for payment of debts.

SECTION I.

OF THE VALIDITY OF THE TRUST.

1. A trust for payment of debts may be created either by *will* or by act *inter vivos*.¹

2. *Validity of a trust for payment of debts.* — A trust created by *will* for payment of debts out of *personal estate* is so far

¹ *Trusts for the payment of debts.* — A debtor may convey his property to a trustee, who shall use it in paying the debts of the former; *De Wolf v. Chapin*, 4 Pick. 59; *Claffin v. Maglaughlin*, 65 Pa. St. 492. The conveyance may be for the benefit of all creditors, or for the benefit of all assenting creditors, and is sometimes bipartite, sometimes tripartite in form. In some states preferences are allowed as at common law, in some they are not. There are generally some statutory provisions, controlling to a greater or less extent. *Hatch v. Smith*, 5 Mass. 42; *Beck v. Parker*, 65 Pa. St. 262; *Graham v. Anderson*, 42 Ill. 514; *Williams v. Brown*, 4 Johns. Ch. 682; *Tompkins v. Wheeler*, 16 Pet. 106. The statutory provisions, however, apply only to general assignments; *Henshaw v. Sumner*, 23 Pick. 446; *Bates v. Coe*, 10 Conn. 281; *Barker v. Hall*, 13 N. H. 298. A corporation like an individual may assign for the benefit of its creditors; *Flint v. Clinton Co.* 12 N. H. 431; *Bank v. Huth*, 4 B. Mon. 423; *Catlin v. Eagle Bank*, 6 Conn. 233; *McCallie v. Walton*, 37 Ga. 611; *Dana v. Bank of U. S.* 5 Watts & S. 223; but see *Loring v. U. S. Co.* 30 Barb. 644; *Beans v. Bullitt*, 57 Pa. St. 221. No particular form of assignment is required unless there is a statutory requirement; *Mussey v. Noyes*, 28 Vt. 462; *United States v. Bank of U. S.* 8 Rob. (La.) 262; *Bishop v. Harts' Trustees*, 28 Vt. 71; *Gordon v. Green*, 10 Ga. 534; *Page v. Weymouth*, 47 Me. 238; *Wallace v. Wainwright*, 87 Pa. St. 263. In some states the assent of creditors to the trust deed is not required, it being presumed; *Fellows v. Greenleaf*, 43 N. H. 421; *Gibson v. Rees*, 50 Ill. 383; *Stimpson v. Fries*, 2 Jones Eq. 156; *Tennant v. Stoney*, 1 Rich. Eq. 222; 44 Am. Dec. 213; while in others the creditors must either be parties to the assignment or at least assent to it; *Widgery v. Haskell*, 5 Mass. 144; *Pierce v. O'Brien*, 129 Mass.

a nullity, that the executor is bound, at all events, to provide for the payment of debts out of the assets in a due course

314; *May v. Wannemacher*, 111 Mass. 202; and that too within a certain time; *Whitney v. Kelley*, 67 Me. 377; *Carr v. Dole*, 17 Me. 358. If such an assignment is intended to delay or hinder creditors it will be void; *Bodley v. Goodrich*, 7 How. 277; *Jessup v. Hulse*, 29 Barb. 539; *Knight v. Packer*, 1 Beasley's Ch. 214; 72 Am. Dec. 388; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806. The debtor must cease to have any control over the property; *Planck v. Schermerhorn*, 8 Barb. Ch. 644; *Hardcastle v. Fisher*, 24 Mo. 70; *Pope v. Brandon*, 2 Stew. 401; 20 Am. Dec. 49; *Reed v. Emery*, 8 Paige, 417; *Litchfield v. White*, 3 Sandf. 547. Fraud vitiates an assignment, and that may be evidenced in a variety of ways; *Bennett v. Union*, 5 Humph. 612; *Mitchell v. Beal*, 8 Yerg. 142; *Hindman v. Dill*, 11 Ala. 689; *Sheldon v. Dodge*, 4 Denio, 218; *Meacham v. Sternes*, 9 Paige, 398; *D'Ivernois v. Leavitt*, 23 Barb. 63. A power to sell other than for cash may or may not affect the trust; *Pierce v. Brewster*, 32 Ill. 268; *Booth v. McNair*, 14 Mich. 19; *Page v. Olcott*, 28 Vt. 465; *Neally v. Ambrose*, 21 Pick. 185; *Ely v. Hair*, 16 B. Mon. 230; a power to sell does give power to bind estate by a covenant of warranty; *Welsh v. Davis*, 3 S. C. 110; likewise possession of the trust property by the settlor; *Foster v. Saco Co.* 12 Pick. 451; *Coburn v. Pickering*, 3 N. H. 415; 14 Am. Dec. 375; *Putnam v. Osgood*, 52 N. H. 148; *Strong v. Carrier*, 17 Conn. 319; *Rogers v. Vail*, 16 Vt. 329; *Brooks v. Marbury*, 11 Wheat. 82; but see *Lockhart v. Wyatt*, 10 Ala. 231; 44 Am. Dec. 481; likewise of a reservation of a surplus to the settlor; *Dana v. Lull*, 17 Vt. 390; *Doremus v. Lewis*, 8 Barb. 124; *Austin v. Johnson*, 7 Humph. 191; *Partridge v. Messer*, 14 Gray, 180; *Case v. Gerrish*, 15 Pick. 50. The creditors must not be required to cancel their claims until a settlement is made; *Grover v. Wakeman*, 11 Wend. 187; *Doe v. Scribner*, 41 Me. 277; *Hind v. Silsby*, 10 N. H. 108; *Brown v. Lyon*, 17 Ala. 659; but see *Halsey v. Whitney*, 4 Mason, 207; *Nostrand v. Atwood*, 19 Pick. 281; *Skipwith v. Cunningham*, 8 Leigh, 272. An assignment containing trust for assignor is void in some states; *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57. The difference between a sale and an assignment is that in case of a sale a consideration passes, if an assignment, it does not; *Ruhl v. Phillips*, 48 N. Y. 125; 8 Am. Rep. 522. The beneficial ownership of property, assigned for creditors, is in the creditors for whom trust is created, and in those holding collateral, as well as in those who do not; *Patten's App.* 45 Pa. St. 151; 84 Am. Dec. 479. Trustee may use discretion in selling and need not always sell immediately for cash; *Inloes v. American Ex. Bank*, 11 Md. 173; 69 Am. Dec. 190; see *McCleery v. Allen*, 7 Neb. 21; 29 Am. Rep. 377; a reservation to debtor not fraudulent, and sale may be either public or private; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637. Property should not be kept more than a year; *Grimsley v. Hooker*, 3 Jones Eq. 4; 67 Am. Dec. 227. Trustee may be allowed to cultivate land till sold; *Dubose v. Dubose*, 7 Ala. 235; 42 Am. Dec. 588.

If the assignment has been executed, delivered, and assented to, if assent is necessary, it cannot then be revoked; *Petrikin v. Davis*, 1 Morris, 296; *Robertson v. Sublett*, 6 Humph. 313; *Ingram v. Kirkpatrick*, 6 Ired. Eq. 463; 51 Am. Dec. 428; *Scull v. Reeves*, 2 Green's Ch. 84; 29 Am. Dec. 694; a debtor cannot make an assignment providing for the settlement of his estate for his own use; *Mackason's App.* 42 Pa. St. 330; 82 Am. Dec. 617. The

of administration, and would not be justified in the breach of this legal obligation by pleading any expression of inten-

property vests in an assignee immediately on acceptance of the trust by him, and he cannot then divest himself of it by simply refusing to carry out the trust; *Seal v. Duffy*, 4 Pa. St. 274; if trustee is not knowing to the instrument, his assent will be presumed; *Ward v. Lewis*, 4 Pick. 518; *Pingree v. Comstock*, 18 Pick. 46; *Shepherd v. M'Evers*, 4 Johns. Ch. 136; *Merrills v. Swift*, 18 Conn. 257. An assignment has been held good as against creditors, where assignor is out of state, from the time of his placing it in the post office; *Johnson v. Sharp*, 31 Ohio St. 611. Liens may take priority of the actual acceptance by the trustee; *Crosby v. Hillyer*, 24 Wend. 280. If there is sufficient reason, one creditor may have an assignment nullified, and sometimes obtains a preference; *Wakeman v. Grover*, 4 Paige, 24; *Burrall v. Leslie*, 6 Paige, 445; in such case creditors will be paid *pari passu*; *Austin v. Bell*, 20 Johns. 442; *M'Meeke v. Edmonds*, 1 Hill Eq. 293.

In enforcing a trust of this kind, the nature of the instrument will determine who are necessary parties; *Haughton v. Davis*, 23 Me. 28; *Kerr v. Blodgett*, 48 N. Y. 62; *Hobart v. Andrews*, 21 Pick. 532. One may be creditor, cestui que trust, and trustee, but can receive no advantage over other creditors, because of it; *Harrison v. Mock*, 10 Ala. 185; *Prevost v. Gratz*, Pet. C. C. 373; *Miles v. Bacon*, 4 J. J. Marsh. 468; *Jewett v. Woodward*, 1 Edw. Ch. 195; *Pratt v. Adams*, 7 Paige, 615.

An assignment to pay debts, carries with it by implication, a power to sell the assigned property; *Gould v. Lamb*, 11 Met. 84; *Goodrich v. Proctor*, 1 Gray, 567.

The purchaser need not look after the application of the purchase-money; *Gardner v. Gardner*, 3 Mason, 178; *Hauser v. Shore*, 5 Ired. Eq. 357; *Williams v. Otey*, 8 Humph. 568; *Andrews v. Sharhawk*, 13 Pick. 393; unless the trust is confined to special debts; *Cadbury v. Duval*, 10 Barr, 267; *Duffy v. Calvert*, 6 Gill, 487.

The same rules apply to partnerships, and the general principles relating to firm and individual debts; *Murrill v. Neill*, 8 How, 414; *Andress v. Miller*, 15 Pa. St. 318; *Mills v. Argall*, 6 Paige, 577; *Jackson v. Cornell*, 1 Sandf. Ch. 348.

A direction to pay debts includes only such as could be legally collected from the estate; *Rogers v. Rogers*, 3 Wend. 503. Only debts bearing interest, will have it added to the principal; *Bryant v. Russell*, 23 Pick. 508.

An assignment or trust for the benefit of creditors does not affect the Statute of Limitations; *Christy v. Flemington*, 10 Barr, 129; *Read v. Johnson*, 1 R. I. 81.

A creditor need not have a judgment at law to maintain a bill against a trustee, to prevent him from abusing the trust and appropriating the trust funds to himself; *Miller v. Davidson*, 3 Gil. 518; 44 Am. Dec. 715. The court will see that such a trust does not fail for want of a trustee, even if the assignee named renounces or relinquishes it; *Scull v. Reeves*, 2 Green's Ch. 131; 29 Am. Dec. 703; the ignorance of the assignor will not be cause for setting aside the assignment; *Ib.*; assignees in trust for creditors are not bona fide purchasers for value, and will not be protected as they would be; *Clark v. Flint*, 22 Pick. 231; 33 Am. Dec. 733; in case of suit assignee brings action in his own name; *Buck v. Swazey*, 35 Me. 41; 56 Am. Dec. 681. Creditor to take advantage of fraud in deed of trust, should get judgment

tion on the part of the testator. It is only as respects any *surplus* personal estate after payment of debts that the executor ought to regulate his administration by the directions of the will. A devise, however, of *real estate* for payment of debts is in all cases unimpeachable, for the statutes that have avoided devises as against specialty creditors (*a*), and now as against simple contract creditors (*b*), have expressly excepted devises for payment of debts.

3. Trust created by act *inter vivos* attended with fraud.—

As to trusts created by act *inter vivos*, a trust for payment of debts will in all cases be void, if vitiated by *actual fraud*, as if the debtor by an understanding between him and his trustees be left in possession of the estate so as to obtain a fictitious credit (*c*).

(*a*) 11 G. 4 & 1 W. 4, c. 47.

(*b*) 3 & 4 W. 4, c. 104.

(*c*) *Twyne's case*, 3 Rep. 80 a;
Wilson v. Day, 2 Burr. 827; *Hungerford v. Earle*, 2 Vern. 261; *Tarback v. Marbury*, 2 Vern. 510; *Law v.*

Skinner, W. Bl. 996; and see *Worseley v. De Mattos*, 1 Burr. 467; *Stone v. Grantham*, 2 Buls. 218; *Pickstock v. Lyster*, 3 M. & S. 371; *Dutton v. Morrison*, 17 Ves. 197.

and execution; *Green v. Kornegay*, 4 Jones Law, 66; 67 Am. Dec. 261. A *bona fide* trust deed to secure future advances may be valid; *Wilson v. Russell*, 13 Md. 495; 71 Am. Dec. 645. Misconduct of trustee in not selling trust property cannot affect the creditors or impair their rights; *Carter v. Neal*, 24 Ga. 346; 71 Am. Dec. 136. An assignee of the trustee will be compelled to execute the original trust at the instance of the cestui que trust; *Pierce v. McKeehan*, 3 Pa. St. 136; 45 Am. Dec. 635. A vendor selling land and not receiving all the purchase-money will become a trustee, and if he is insolvent at any time his interest therein passes to his assignee; *Swepson v. Rouse*, 65 N. C. 34; 6 Am. Rep. 735. A trust in favor of an insolvent may be enforced in equity by the beneficiary against the trustee; *Baker v. Evans*, *Winston's Eq.* 109; 86 Am. Dec. 456; *Ferguson v. Haas*, 64 N. C. 778.

Any balance remaining after the payment of debts goes to the assignor; *Steevens v. Earles*, 25 Mich. 41; *Hall v. Denison*, 17 Vt. 311. Any hostile creditors may resort to a trustee process or its equivalent; *Hastings v. Baldwin*, 17 Mass. 558; *Todd v. Bucknam*, 2 Fairf. 41. A deed absolute on its face may create a trust; *Campbell v. Dearborn*, 109 Mass. 130. Corporations may receive deeds of trust; *Wright v. Bundy*, 11 Met. 398; *Fogarty v. Sawyer*, 23 Cal. 570; *Wilson v. Troup*, 7 Johns. Ch. 25; *Smith v. Doe*, 26 Miss. 291.

Acceptance of trust may be shown by parol; *Field v. Arrowsmith*, 3 Humph. 442; *Brevard v. Neely*, 2 Sneed, 164. A trust to secure bondsmen is good; *Roden v. Jaco*, 17 Ala. 344. Statutes regulate powers, but do not create them; see *Richmond v. Hughes*, 9 R. I. 228; *Elliott v. Wood*, 45 N. Y. 71.

[*510] *4. **Person not a trader might create trust for payment of debts.**—Under the old bankruptcy laws, a broad distinction was made between non-traders and traders. If the settlor was *not a trader* he was not amenable to the bankrupt laws, and therefore was at perfect liberty to dispose either of the whole (*a*) or of *part* of his property (*b*), for payment of *all* (*c*), or *any number* of his creditors (*d*). The argument formerly urged for the invalidity of such a trust was that 13 Eliz. c. 5 (*e*) avoided “all alienations contrived of *fraud*, to delay creditors and others of their just debts,” &c. But with respect to a trust for the satisfaction of creditors *generally*—“How,” said Le Blanc, J., “can it be fraudulent for a person not the object of the bankrupt laws to make the same provision voluntarily for the benefit of all his creditors which the law compels to be done in the case of a bankrupt trader?” (*f*); and if the settlor direct the payment of *particular* debts only, “It is neither illegal nor immoral,” said Lord Kenyon, “to prefer one set of creditors to another” (*g*). Nor did the creation of such a trust fall within the scope of the Act; for “it is not every feoffment, judgment, &c.,” said Lord Ellenborough, “which will have the *effect* of delaying or hindering creditors of their debts, &c., that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors: every assignment of a man’s property, however good and honest the consideration, must diminish the fund out of

(*a*) *Ingliss v. Grant*, 5 T. R. 530; *Nunn v. Wilmore*, 8 T. R. 528, *per* Lord Kenyon; *Pickstock v. Lyster*, 3 M. & S. 371; *Leonard v. Baker*, 1 M. & S. 251; see *Meux v. Howell*, 4 East, 1. As to what property will pass by general words in a creditors’ deed and whether the trustees can disclaim any part which is a *damnosa possessio*, see *How v. Kennett*, 3 Ad. & Ell. 659; *Carter v. Warne*, Moo. & Ma. 479; *West v. Steward*, 14 M. & W. 47.

(*b*) *Estwick v. Caillaud*, 5 T. R. 420; *Goss v. Neale*, 5 Taunt. 19; see *Meux v. Howell*, 4 East, 1.

(*c*) *Meux v. Howell*, 4 East, 1; *Ingliss v. Grant*, 5 T. R. 530; *Pickstock v. Lyster*, 3 M. & S. 371; *Leonard v. Baker*, 1 M. & S. 251.

(*d*) *Estwick v. Caillaud*, 5 T. R. 420; *Nunn v. Wilmore*, 8 T. R. 528, *per* Lord Kenyon; *Goss v. Neale*, 5 Taunt. 19; *Wood v. Dixie*, 7 Q. B. 892.

(*e*) Perpetuated 29 Eliz. c. 5.

(*f*) *Meux v. Howell*, 4 East, 9.

(*g*) *Estwick v. Caillaud*, 5 T. R. 424; [*Alton v. Harrison*, 4 L. R. Ch. App. 622; *Boldero v. London and Westminster Discount Company*, 5 Ex. D. 47.]

which satisfaction is to be made to his creditors. But the feoffment, judgment, &c., must be *devised of malice, fraud, or the like*, to bring it within the statute: the Act was meant to prevent deeds, &c., fraudulent in their *concoction*, and not merely such as in their *effect* might delay or hinder other creditors "(h).

5. **Fraudulent conveyance.**—If the settlor was a trader, then by 12 & 13 Vict. c. 106, s. 67 * (being a [*511] re-enactment of the previous statutes), it was declared that "any *fraudulent* conveyance, with intent to defeat or delay creditors, should be deemed an act of bankruptcy;" and it was adjudged fraudulent within the meaning of this clause, if a person assigned the *whole* of his property (a) (whether expressed to be the whole or not in the deed (b)), or all but a *colourable* part (c), or all the stock, without which he could not carry on his trade (d).

6. **Grounds of the rule.**—It was immaterial whether the trust was for any *particular* creditor (e), or a *certain number*

(h) *Meux v. Howell*, 4 East, 13, 14; [and see *Spencer v. Slater*, 4 Q. B. D. 13.]

(a) *Nunn v. Wilshire*, 8 T. R. 528, per Lord Kenyon; *Alderson v. Temple*, 4 Burr. 2240, per Lord Mansfield; *Hooper v. Smith*, 1 W. Bl. 441, per *eundem*; *Wilson v. Day*, 2 Burr. 827; *Rust v. Cooper*, Cowp. 632, per Lord Mansfield; *Leake v. Young*, 5 Ell. & Bl. 955; *Bowker v. Burdekin*, 12 M. & W. 128; *Johnson v. Fesenmeyer*, 25 Beav. 88; *Smith v. Cannan*, 2 Ell. & Bl. 35. But see the recent case of *Ex parte Gass*, 2 I. R. Eq. 284, in which it was held (though the decision rested on other grounds), that the question of fraud is one of fact, and therefore if under the peculiar circumstances the Court is satisfied that the conveyance of the bankrupt's *whole* property was *bonâ fide*, and with a view to pay his creditors rather than to defeat them the deed will be supported.

(b) See *Dutton v. Morrison*, 17 Ves. 193; *Lindon v. Sharp*, 6 Man. &

Gr. 905. But the assignment of all his property at a certain place is not an act of bankruptcy, unless it be proved that he had no other property; *Chase v. Goble*, 2 Man. & G. 930.

(c) *Law v. Skinner*, 2 W. Bl. 996; *Hooper v. Smith*, 1 W. Bl. 442, per Lord Mansfield; *Wilson v. Day*, 2 Burr. 832, per *eundem*; *Alderson v. Temple*, 4 Burr. 2240, per *eundem*; *Estwick v. Caillaud*, 5 T. R. 424, per Lord Kenyon; *Gayner's case*, cited 1 Burr. 477; *Compton v. Bedford*, 1 W. Bl. 368; *Johnson v. Fesenmeyer*, 25 Beav. 88; *Ex parte Foxley*, 3 L. R. Ch. App. 515.

(d) *Hooper v. Smith*, 1 W. Bl. 442; *Law v. Skinner*, 2 W. Bl. 996; *Siebert v. Spooner*, 1 M. & W. 714; *Porter v. Walker*, 1 Man. & Gr. 686; *Ex parte Bailey*, 3 De G. M. & G. 534; *Ex parte Taylor*, 5 De G. M. & G. 392; *Lacon v. Liffen*, 4 Giff. 75; and see *Ex parte Hawker*, 7 L. R. Ch. App. 214.

(e) *Wilson v. Day*, 2 Burr. 827; *Hassell v. Simpson*, 1 B. C. C. 99; S.

of them (*f*), or *all* the creditors at large (*g*), for by the assignment of his whole substance the bankrupt became utterly insolvent; and if the trust was for one or some only of his creditors, it was a fraud upon the rest, and if it was for all the creditors, it was a fraud upon the spirit of the bankruptcy laws, which require a bankrupt's estate to be under the management of certain commissioners and assignees appointed as prescribed by the legislature—not of persons nominated by the debtor himself, and so more likely to further his views than promote the interest of the creditors (*h*).

[*512] *7. **Where deed could be supported.**—But in order to avoid the deed, there must have been in the existence a debt due at the time of its execution (*a*); and the assignment, though void as against creditors and the assignees in bankruptcy (*b*), was good as between the parties themselves (*c*). And assignments for valuable consideration at the full price, where the purchaser was not party or privy to the fraudulent designs of the vendor (*d*), or for less than the full price, if the transaction was *bonâ fide* (*e*), and mortgages made *bonâ fide* for fresh advances (*f*), or to secure payment of old debts and further advances combined (*g*), were not acts of bankruptcy and could not be impeached; and a conveyance and assignment by a trader *bonâ fide* of

C. Doug. 89, note; Hooper v. Smith, 1 W. Bl. 442, *per* Lord Mansfield; Worseley v. De Mattos, 1 Burr. 467; Newton v. Chantler, 7 East, 138.

(*f*) *Ex parte* Foord, cited Worseley v. De Mattos, 1 Burr. 477; Alderson v. Temple, 4 Burr. 2240, *per* Lord Mansfield; Butcher v. Easto, Doug. 282; Devon v. Watts, Doug. 86; Hooper v. Smith, 1 W. Bl. 442, *per* Lord Mansfield.

(*g*) Kettle v. Hammond, 1 Cooke's B. L. 108, 3d edit.; Eckhardt v. Wilson, 8 T. R. 140; Tappenden v. Burgess, 4 East, 230; Dutton v. Morrison, 17 Ves. 199, *per* Lord Eldon; Simpson v. Sikes, 6 M. & S. 312.

(*h*) See Dutton v. Morrison, 17 Ves. 199; Worseley v. De Mattos, 1

Burr. 476; Simpson v. Sikes, 6 M. & S. 312.

(*a*) *Ex parte* Taylor, 5 De G. M. & G. 392; *Ex parte* Thomas, De Gex, 612; *Ex parte* Louch, De Gex, 463; Oswald v. Thompson, 2 Exch. 215.

(*b*) Doe v. Ball, 11 M. & W. 531.

(*c*) Bessey v. Windham, 6 Q. B. 166.

(*d*) Baxter v. Pritchard, 1 Ad. & Ell. 456; Rose v. Haycock, *ib.* 460; Smith v. Hurst, 10 Hare, 30.

(*e*) Lee v. Hart, 10 Exch. 555.

(*f*) Bittlestone v. Cooke, 6 Ell. & Bl. 296; Hutton v. Cruttwell, 1 Ell. & Bl. 15; Harris v. Rickett, 4 H. & N. 1; *Re* Colemere, 1 L. R. Ch. App. 128.

(*g*) Whitmore v. Dowling, 2 Foster & Finlason, 134.

all his property substantially to trustees upon trust to convert into money and hold the proceeds upon trust for the settlor, or his appointees, was not an act of bankruptcy (*h*).

8. **What concomitant circumstances would not vary the rule.**—A fraudulent deed was an act of bankruptcy, notwithstanding a proviso declaring it void *if the trustees thought fit* (*i*), or *if all the creditors should not execute* (the acts of the trustees to be good in the meantime) (*j*); or *if all the creditors to a certain amount should not execute by such a time, or a commission of bankruptcy should issue* (*k*). So it was an act of bankruptcy, though the trustees at the time of the execution of the deed did not intend to act upon it (for the fraud was to be referred to the *animus* of the trader) (*l*); and though the trustees induced the debtor to execute it, with the object of making it an act of bankruptcy (*m*); and though the debtor himself meant it to be taken as an act of bankruptcy (*n*).

9. **No act of bankruptcy, if deed could not be enforced.**—But if A., B., and C. agreed to execute an assignment as a joint transaction, and A. executed, but B. and C. refused, then, as the assignment of A. was made on the footing and faith of B. and C.'s concurrence, and therefore could not be enforced against A. individually and solely, it was no act of bankruptcy (*o*).

10. **Assignment executed abroad.**—An assignment executed abroad was at one time held to be *no act [*513] of bankruptcy in England (*a*); but in this respect the law has been altered by statute (*b*).

11. **Creditors concurring or acquiescing could not treat it as an act of bankruptcy.**—If any creditors either *concurred* in

(*h*) *Greenwood v. Churchill*, 1 M. & K. 546; and see *Berney v. Davison*, 1 Brod. and B. 408; 4 Moore, 126.

(*i*) *Tappenden v. Burgess*, 4 East, 230.

(*j*) *Back v. Gooch*, 4 Camp. 232; S. C. Holt, 13.

(*k*) *Dutton v. Morrison*, 17 Ves. 193.

(*l*) *Tappenden v. Burgess*, 4 East, 230.

(*m*) *Id.*

(*n*) *Simpson v. Sikes*, 6 M. & S. 295.

(*o*) *Dutton v. Morrison*, 17 Ves. 193, see 202; and see *Bowker v. Burdakin*, 11 M. & W. 128.

(*a*) *Norden v. James*, 2 Dick. 533; *Ingliss v. Grant*, 5 T. R. 530.

(*b*) 6 G. 4. c. 16, s. 3, repealed and re-enacted by 12 & 13 Vict. c. 106, s. 67, re-enacted in effect by 32 & 33 Vict. c. 71, s. 6; [46 & 47 Vict. c. 62, s. 4.]

the assignment (*c*), or subsequently *acquiesced* in it (*d*), they could not afterwards treat it as an act of bankruptcy, for it was not fraudulent as to them. And a trust deed, which as concurred or acquiesced in by all the creditors could not have been impeached under a fiat sued out by a creditor, could not be impeached under the bankrupt's own fiat (*e*).

12. Trader might assign part in trust for his creditors. — Unless he contemplated bankruptcy. — If a person assigned *part* only of his property in trust for creditors, then, if the transaction was *fair* and *bond fide*, and in the ordinary course of business, or upon the pressure of the creditors, it was not open to objection (*f*); but if the settlor contemplated bankruptcy (*g*), or even thought it probable, though not inevitable (*h*), and wished to give an undue preference to certain creditors over others, it was *fraudulent*, and constituted an act of bankruptcy.

13. Assent or acquiescence. — Although the deed was void for any reason at law, yet it might be supported in equity as to creditors who had assented to it, or acquiesced in it, though without actual execution (*i*).

(*c*) *Eckhardt v. Wilson*, 8 T. R. 142, *per Cur.*; *Bamford v. Baron*, 2 T. R. 594, note (*a*); *Tappenden v. Burgess*, 4 East, 230, *per Lord Ellenborough*; *Ex parte Cawkwell*, 1 Rose, 313.

(*d*) *Ex parte Crawford*, 1 Chris. B. L. 97, 140; *Ex parte Low*, 1 G. & J. 84, *per Lord Eldon*; *Ex parte Cawkwell*, 1 Rose, 313; *Ex parte Shaw*, 1 Mad. 598; *Back v. Gooch*, 4 Camp. 432; S. C. Holt, 13.

(*e*) *Ex parte Philpot*, De Gex, 346; *Ex parte Louch*, Id. 463; *Ex parte Thomas*, Id. 612.

(*f*) *Hale v. Allnutt*, 18 C. B. 505; *Wheelwright v. Jackson*, 5 Taunt. 109; *Hartshorn v. Slodden*, 2 B. & P. 582; *Fidgeon v. Sharp*, 5 Taunt. 539; *Small v. Oudley*, 2 P. W. 427; *Cock v. Goodfellow*, 10 Mod. 489; *Compton v. Bedford*, 1 W. Bl. 362, *per Lord Mansfield*; *Hooper v. Smith*, 1 W. Bl. 441; *Alderson v. Temple*, 4 Burr. 2240, *per Lord Mansfield*; *Wilson v.*

Day, 2 Burr. 830, *per eundem*; *Ib.* 831, *per Foster and Wilmot*; *Jacob v. Shepherd*, cited *Worseley v. De Mattos*, 1 Burr. 478; *Harmon v. Fisher*, Cowp. 123, *per Lord Mansfield*; *Rust v. Cooper*, Cowp. 634, *per eundem*; *Ex parte Scudamore*, 3 Ves. 85; and see *Estwick v. Caillaud*, 5 T. R. 424; *Newton v. Chantler*, 7 East, 144; *Johnson v. Fesenmeyer*, 25 Beav. 88; *Ex parte Gass*, 2 L. R. Eq. 284.

(*g*) *Linton v. Bartlet*, 3 Wils. 47; *Morgan v. Horseman*, 3 Taunt. 241; *Alderson v. Temple*, 4 Burr. 2238; *Round v. Byde*, 1 Cooke, B. L. 114, 3d ed.; *Devon v. Watts*, Doug. 86; *Pulling v. Tucker*, 4 B. & Ald. 382; *Harman v. Fisher*, Cowp. 117.

(*h*) *Poland v. Glyn*, 2 D. & R. 310; *Guthrie v. Crossley*, 2 C. & P. 301.

(*i*) *Spottiswoode v. Stockdale*, G. Coop. 102; *Re Baber's Trust*, 10 L. R. Eq. 554.

14. **Where trust valid, the terms must be strictly observed.** — On the other hand, a creditor was not bound by the arrangement but might recover his whole debt, if the terms of the composition were not strictly and literally fulfilled; for *cujus est dare *ejus est disponere*, and the creditor [*514] has a right to prescribe the conditions of his indulgence (a).

15. [**Bankruptcy Act, 1883.** — By the Bankruptcy Act, 1869, (32 & 33 Vict. c. 71, which repealed 12 & 13 Vict. c. 106, and the subsequent Bankruptcy Act of 1861), the law of bankruptcy was put upon a new footing. But this Act has itself been repealed by the Bankruptcy Act, 1883 (b), which has again introduced a new law of bankruptcy. All persons, whether *traders or otherwise*, are now amenable to the bankruptcy laws. By the 4th section of the late Act the following acts (amongst others) are made acts of bankruptcy, viz. —

1. **Acts of bankruptcy.** — That the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

2. That the debtor has in England or elsewhere made a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof.

3. **Limitation of time.** — That the debtor has in England or elsewhere made any conveyance or transfer of his property or any part thereof, or created any charge thereon which would under that or any other Act be void as a fraudulent preference if he were adjudged bankrupt (c).

But by the 6th section a creditor is not to be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy has occurred within *three months* before the presentation of the petition for adjudication. Until the expiration, therefore, of these three months] the trustees of

(a) *Sewell v. Musson*, 1 Vern. 210; *Mackenzie v. Mackenzie*, 16 Ves. 374, per Lord Eldon; *Leigh v. Barry*, 3 Atk. 583, per Lord Hardwicke; *Ex parte Bennett*, 2 Atk. 527, per eundem;

and see *Fuller v. Lance*, 7 Vin. Ab. 136.

[(b) 46 & 47 Vict. c. 52.]

[(c) As to what constitutes a fraudulent preference under the Act, see sect. 48.]

a creditors' deed must forbear to act, or their proceedings may be overridden by a subsequent adjudication of bankruptcy. However, the trustees may begin the exercise of their office at an earlier day if they can only satisfy themselves either that all the creditors have concurred or acquiesced in the deed, or that such as have not cannot either collectively or individually prove a debt or debts in the requisite amount to support an adjudication of bankruptcy.

Now that the distinction between traders and non-traders has substantially been abolished, what before was a fraudulent conveyance as to traders only, will be a fraudulent conveyance as to non-traders also (*d*).

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*SECTION II.

WHAT CREDITORS' DEEDS ARE REVOCABLE.

1. **Irrevocable trusts.**—The existence of a debt is always a sufficient consideration to support an assurance as valid and irrevocable as against the grantor (*a*); indeed the assurance will almost always assume the form either of a conveyance in satisfaction or part satisfaction of the debt (in which case, the extinction or partial extinction of the debt forms the consideration), or of a security accompanied with a forbearance to sue (*b*). Thus if A. be indebted to B., and convey an estate to him by way of security, the deed, though no money passed at the time, and there was no previous arrangement, cannot be revoked by A., but B. may insist on the benefit of it (*c*). And if the creditor be not a party to

(*d*) *In re Wood*, 7 L. R. Ch. App. 302.

(*a*) See *Rice v. Rice*, 2 Drew. 84. But a conveyance by way of security from a debtor to his creditor, where there is no pressure, may be a fraudulent preference within the meaning of the Bankruptcy Acts; *Goodricke v. Taylor*, 2 H. & M. 380; and, if the debtor's whole property be included, an act of bankruptcy; *Ex parte Trevor*, 1 Ch. D. 297; [and see 46 & 47 Vict. c. 52, s. 48.]

(*b*) It has been suggested, however, that a mere agreement to give a mortgage for a bygone debt, unaccompanied by any express stipulation as to forbearance, cannot be enforced. See *Crofts v. Feuge*, 4 Ir. Ch. Rep. 316; *Woodroffe v. Johnson*, 4 Ir. Ch. Rep. 319.

(*c*) *Siggers v. Evans*, 5 Ell. & Bl. 367; *Montefiore v. Browne*, 7 H. L. Cas. 241; *Morris v. Venables*, 15 W. R. 2.

the deed, yet if, by arrangement between him and the debtor, an estate is vested in a trustee for securing the debt, he can enforce the trust (*d*). Even where a debtor entered into an arrangement with three of his creditors, and in pursuance thereof, by a deed between himself of the first part, the three creditors of the second part, and his other creditors of the third part, conveyed all his real and personal estate to the three creditors, in trust for themselves and the other creditors, it was held that the intention was to make the creditors *cestuis que trust*, and that the deed was irrevocable; and no distinction was taken between the three creditors and the other creditors, although the latter apparently had not been in communication with the debtor previous to the deed, and had not executed it until some time afterwards (*e*).

* 2. **Revocable trusts.**— On the other hand, if a [*516] debtor, without communication with his creditors, and, indeed, only from motives of personal convenience, as on going abroad (*a*), vests an estate in trustees upon trust to pay his debts, the trustees are mere *mandatories*, and the deed confers no right upon the creditors who are neither parties nor privies, and the debtor may at any time, at his pleasure, revoke or vary the trusts, or call for the re-transfer of the property (*b*). And if two persons have different interests in the same estate, and they, by arrangement between themselves, but without communication with any creditor, convey the property to trustees, upon trust to pay the debts of either party: here, though each may enforce the trust as against the other, yet the deed is revocable by both, and the creditor, as he neither required the security, nor was an object of bounty, cannot, while the deed remains revocable, compel the execution of the trust in his own

(*d*) Wilding v. Richards, 1 Coll. 661.

(*e*) Mackinnon v. Stewart, 1 Sim. N. S. 76.

(*a*) Cornthwaite v. Frith, 4 De G. & Sm. 552.

(*b*) Walwyn v. Coutts, 3 Sim. 14; 3 Mer. 707; Smith v. Keating, 6 C.

B. 136; Acton v. Woodgate, 2 M. & K. 492; Henriques v. Bensusan, 20 W. R. 350; Browne v. Cavendish, 1 Jon. & Lat. 606; [Johns v. James, 8 Ch. D. 744; Re Sanders' Trusts, 47 L. J. N. S. Ch. 667;] and Synnot v. Simpson, 5 H. L. Cas. 121.

favour (c). And *à fortiori*, this is the case if the payment of the debt is to be made only on the request of the settlor (d). But, of course, the trust cannot be revoked by the settlor, so as to defeat or prejudice what the trustees may have done previously in the due execution of the trust (e).

3. *Garrard v. Lauderdale*. — In *Garrard v. Lauderdale*, the Duke of York, by indenture between himself of the first part, trustees of the second part, and the creditors of the third part, conveyed certain property to trustees upon trust for his creditors, and upon the execution of the deed a circular to that effect was sent to each of the creditors. Here there was ground for contending that, as the creditors had been induced by the notice to forbear suing the settlor, they had acquired a right to the execution of the trust, but Sir L. Shadwell, observing that the receipt of the circular was not admitted, and that, if received, yet the creditors had not refrained from suing, as they had proved against the Duke's estate, decided that the creditors had no equity to enforce

the trust (f), and the decree, on appeal to Lord [*517] Brougham, was affirmed (g). The authority, * how-

ever, of this case has, on several occasions, been questioned (a); and Lord St. Leonards observed he should be sorry to have it understood that a man may create a trust for creditors, communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his power (b). There can be little doubt that upon the general principles of equity the settlor, by giving notice to the trustees, and by subsequent conduct, may con-

(c) *Gibbs v. Glamis*, 11 Sim. 584; *Simmonds v. Palles*, 2 Jon. & Lat. 489; and see *Synnot v. Simpson*, 5 H. L. Cas. 121.

(d) *Evans v. Bagwell*, 2 Conn. & Laws. 612.

(e) *Wilding v. Richards*, 1 Coll. 655, see 659; and see *Kirwan v. Daniel*, 5 Hare, 493.

(f) 3 Sim. 1.

(g) 2 R. & M. 451; and see *Cornthwaite v. Frith*, 4 De G. & Sm. 552; *Stone v. Van Heythuysen*, Kay, 727.

(a) See *Acton v. Woodgate*, 2 M. & K. 495; *Kirwan v. Daniel*, 5 Hare, 499; *Simmonds v. Palles*, 2 Jon. & Lat. 495, 504; *Siggers v. Evans*, 6 Ell. & Bl. 367. [But see *Johns v. James*, 8 Ch. D. 744, where the Court of Appeal approved of and followed *Garrard v. Lauderdale*; *Montefiore v. Browne*, 7 H. L. Cas. 241.]

(b) *Browne v. Cavendish*, 1 Jon. & Lat. 635; 7 Ir. Eq. Rep. 388.

fer on the creditors a right which they did not originally possess (c); and indeed it has now been decided that if property be assigned to a trustee, and he takes possession of it, and communicates with certain of the creditors, who express their satisfaction, the trust is irrevocable (d).

4. **Trustee one of the creditors.** — If the trustee be himself a creditor, the debt forms a sufficient consideration on behalf of the creditor, and the deed is irrevocable (e); and in one case, where property was vested in a trustee for creditors, and the trustee was a *surety* for some of the debts, it was held that, though the trust was revocable as to the general creditors, yet the trustee himself was not bound to reconvey the estate until the suretyship was satisfied (f).

5. **Nature of the revocable trust.** — It does not clearly appear from the authorities what is the precise nature of a *revocable* trust of this kind. The instrument is sometimes called a *deed of agency*, and if so, the trust must be considered at an end at the death of the settlor, and the property, so far as it has not been applied, must be administered as part of the settlor's assets (g). The trust is not regarded as revocable only during the life of the settlor, so as to give a vested interest to the creditor after his death, for it has been held that the creditor *has no more [*518] equity to enforce the trust after a settlor's death than in his lifetime (a).

6. **Voluntary trust.** — Suppose there is no fraud, but the trust deed is a mere *voluntary* settlement not founded on

(c) Perhaps the old case of *Langton v. Tracy*, 2 Ch. Rep. 30, was decided on this principle, for it appears that Tracy, the trustee, declared to the creditors that he would pay the debts, and that some of the debts were actually paid under the deed. The creditors may also have been privies, though not parties, to the execution of the trust, for it is stated that the settlor executed the deed to avoid prosecution against him by his creditors.

(d) *Harland v. Binks*, 15 Q. B. 713; *Nicholson v. Tutin*, 2 K. & J. 18;

and see *Synnot v. Simpson*, 5 H. L. Cas. 121; *Cosser v. Radford*, 1 De G. J. & S. 585; [*Johns v. James*, 8 Ch. D. 744.]

(e) *Siggers v. Evans*, 5 Ell. & Bl. 387. [See *Johns v. James*, 8 Ch. D. 744.]

(f) *Wilding v. Richards*, 1 Coll. 655; and see *Gurney v. Oranmore*, 4 Ir. Ch. Rep. 470; S. C. 5 Ir. Ch. Rep. 436.

(g) *Wilding v. Richards*, 1 Coll. 655.

(a) *Garrard v. Lauderdale*, 3 Sim. 1; and see *Synnot v. Simpson*, 5 H. L. Cas. 139.

any arrangement with the creditors, but for the mere convenience of the debtor himself, so that it is revocable by the debtor at any time until communicated to some creditor (*b*)—in that case can a *creditor*, taking out execution, levy his debt upon the property subject to the trust? It seems, though the deed is *voluntary*, yet it is not to be considered as fraudulent within the statute 13 Eliz. c. 5, and if so, the creditor cannot reach the property at *law* (*c*). However, the deed might perhaps be held to be invalid as against the creditor in a Court of equity (*d*).

7. *Post obit trusts*.—It has been doubted, whether the doctrine of revocability extends to a case where the trust is to come into operation only on the *death* of the settlor, and where subject to a trust for payment of debts the lands charged are conveyed by way of bounty to a third person, the presumption rather being that the creditors were also meant to be objects of the settlor's *bounty* (*e*).

8. *Doctrine not likely to be extended*.—The Courts at the present day consider the doctrine under which these deeds have been held revocable to have been carried far enough, and have expressed a disinclination to extend it (*f*).

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* SECTION III.

OF THE DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS.¹

Duties of trustees.—Upon this subject we shall consider, *First*. *What debts* are to be paid; *Secondly*. In what order

(*b*) *Walwyn v. Coutts*, 3 Mer. 707; S. C. 3 Sim. 14; *Garrard v. Lauderdale*, 3 Sim. 1; *Acton v. Woodgate*, 2 M. & K. 492; *Kirwan v. Daniel*, 5 Hare, 500; *Harland v. Binks*, 15 Q. B. 713.

(*c*) *Pickstock v. Lyster*, 3 M. & S. 371; *Estwick v. Caillaud*, 5 T. R. 420. But see *Owen v. Body*, 5 Ad. & Ell. 28.

(*d*) See *Mackinnon v. Stewart*, 1

Sim. N. S. 90, 91; *Smith v. Hurst*, 1 Coll. 705.

(*e*) *Synnot v. Simpson*, 5 H. L. Cas. 141.

(*f*) *Wilding v. Richards*, 1 Coll. 659; *Kirwan v. Daniel*, 5 Hare, 499; *Simmonds v. Palles*, 2 Jon. & Lat. 495, 504; *Browne v. Cavendish*, 1 Jon. & Lat. 635; *Evans v. Bagwell*, 2 Conn. & Laws. 616.

¹ *Trustees for the payment of debts*.—In America all the property of a deceased person, whether real or personal, is liable for his debts, and the statutes of the various states make special provision for debts; generally, however, the personal property is primarily liable. Creditors of an estate are

as regards *priority*; and, *Thirdly*. What *interest* is to be allowed.

First. What debts are within the scope of the trust.

1. Debts to be paid are *prima facie* those at date of deed or death of testator.—If the trust be created by *deed*, then, unless a contrary intention be expressed, the debts only at the *date* of the deed will be intended (*a*); but if the provision be contained in a will, the direction will include all debts at the testator's death; unless he specially restrict his meaning to the debts at the making of his *will* (*b*).

2. "Debts affecting the estate."—Where a settlor by deed conveyed all his real and personal property upon trust to pay "all debts then owing by him, and which *affected the estates* thereby conveyed;" the trust, as the settlor had no *judgment* debts at the time, was extended to *bond* debts, but not to *simple contract* debts (*c*). But this distinction was taken upon a deed dated before the Acts making real estates assets for payment of simple contract debts.

- (*a*) *Purefoy v. Purefoy*, 1 Vern. 28. (*c*) *Douglas v. Allen*, 1 Conn. &
(*b*) *Loddington v. Kime*, 3 Lev. 433. Laws. 367; 2 Dru. & War. 213.

not *cestuis que trust*. If creditors acquiesce in a trust in a will, so directing, the executors will become trustees to settle the estate; *Bank of U. S. v. Beverly*, 1 How. 134; *Gardner v. Gardner*, 3 Mason, 178. Payment from personalty shall be first made, and this includes the cancelling of any mortgages existing on the realty; *Hewes v. Dehon*, 3 Gray, 205; *Seaver v. Lewis*, 14 Mass. 83; *Adams v. Brackett*, 5 Met. 280; *Schermerhorn v. Barhydt*, 9 Paige, 29; *Hancock v. Minot*, 8 Pick. 29; *Marsh v. Marsh*, 10 B. Mon. 360; *Leavitt v. Wooster*, 14 N. H. 551. If, however, real estate is purchased subject to a mortgage, it will not be paid off unless a clear intention appears; *Cumberland v. Codrington*, 3 Johns. Ch. 229; *Andrews v. Bishop*, 5 Allen, 490. If personal property is insufficient any real estate specially indicated by the testator for the payment of debts, will come next, as there is a difference between a general and a special charge for debts; *Martin v. Fry*, 17 Serg. & R. 426. Then came lands naturally going to heirs, no indication having been expressed regarding its disposition; *Livingston v. Livingston*, 3 Johns. Ch. 148; *Commonwealth v. Shelby*, 13 Serg. & R. 348; *Robards v. Wortham*, 2 Dev. Eq. 173.

Finally, if necessary, debts will be paid out of specifically devised realty; *Ruston v. Ruston*, 2 Yeates, 54; *Chase v. Lockerman*, 11 G. & J. 186. No deviation from this will be made unless it is the manifest, if not the express, intention of the testator; *Plimpton v. Fuller*, 11 Allen, 140; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Stroud v. Barnett*, 3 Dana, 394; *Blaney v. Blaney*, 1 Cush. 107.

Father providing for debts of son.—In another case a testator directed his trustees to apply 1000*l.* in releasing his son from his liabilities, should the testator not have done so in his lifetime. The son was an uncertificated bankrupt, and the Court considering that debts subsequently to the testator's death were not contemplated, discharged the debts up to that period out of the 1000*l.*, and gave the surplus to the testator's residuary legatee (*d*).

3. **Debts barred by the Statute of Limitations.**—A direction for payment of debts will not *revive* a debt barred by the Statute of Limitations (*e*), though the trustee or executor may have advertised for *all* creditors to come in and prove their debts (*f*); and, if a debt might with due diligence have been established, but there has been *laches* which under ordinary circumstances would be a bar [*520] to relief, the mere fact of the *creation and existence of a trust for payment of debts will not justify the *laches* and enable the claimant to obtain relief (*a*). But a will may be so specially worded as to create a trust for creditors generally, notwithstanding any bar from the Statute of Limitations, for the debts still subsist though the remedy is gone (*b*); and if there be a debt in fact not barred at the date of the deed, or at the death of the testator, the statute will not run afterwards (*c*); for it is not to be inferred that a man abandons his debt because he does not enforce payment at law when he has a trustee to pay him (*d*). Besides, unless delayed of necessity, the trustee ought to discharge the debt at once, and the universal rule is, that the *cestui que trust* ought not to suffer for the *laches* of the

(*d*) *Re Landon's Will*, W. N. 1871, p. 240.

(*e*) *Burke v. Jones*, 2 V. & B. 275, where the previous cases are collected; *Hargreaves v. Michell*, 6 Mad. 326; *O'Connor v. Haslam*, 5 H. L. Cas. 170.

(*f*) *Jones v. Scott*, 1 R. & M. 255; 4 Cl. & Fin. 382; (overruling *Andrews v. Brown*, Pr. Ch. 385); and see *O'Connor v. Haslam*, 5 H. L. Cas. 177.

(*a*) *Harcourt v. White*, 28 Beav. 308.

(*b*) *Williamson v. Taylor*, 3 Y. & C. 208.

(*c*) *Hughes v. Wynne*, T. & R. 307; *Crallan v. Oulton*, 3 Beav. 1; *Hargreaves v. Michell*, 6 Mad. 326; *Executors of Fergus v. Gore*, 1 Sch. & Lef. 107; and see *Mors v. Langham*, cited *Burke v. Jones*, 2 V. & B. 286; *O'Connor v. Haslam*, 5 H. L. Cas. 178.

(*d*) *Hughes v. Wynne*, T. & R. 309, *per Cur.*

trustee (e). If a testator create a trust for payment of the debts of *another person deceased*, the debts to be paid are those which were not barred by the Statute of Limitations at the death of the person so deceased (f).

4. *Legacy duty*.—If a person who has been a bankrupt direct payment of twenty shillings in the pound upon the debts proved in the bankruptcy, the creditors are legatees, and pay *legacy duty*, but there is *no lapse* though a creditor die in the testator's lifetime (g).

5. *Statute of Limitations*.—Where a testatrix had devised an estate to trustees *upon trust to sell and pay debts*, but no part of the produce of sale had been set apart for that purpose, the right of the creditor was held by the late V. C. of England not to be within the exception of the 25th section of the Statute of Limitations, 3 & 4 W. 4, c. 27, but to fall under the 40th section; but that inasmuch as the debt had been acknowledged by the surviving trustee, the case was taken out of the statute (h). However, the opinion of the Vice Chancellor that the case was not within the 25th section would not, it is thought, now prevail, but the right of the creditor would subsist until adverse possession had run against his trustee (i).

6. *But not as regards a testator's personalty*.—The rule that the creation of a trust keeps alive a debt not barred at the testator's death does not apply to a trust declared of **personal estate* by will, for the person- [*521] alty vests in the executor upon trust for the creditors by act of law, so that the words of the will are nugatory (a). Nor does a devise of real estate upon trust to pay debts prevent the operation of the Statute of Limi-

(e) See *Executors of Fergus v. Gore*, 1 Sch. & Lef. 110.

(f) *O'Connor v. Haslam*, 5 H. L. Cas. 170.

(g) *Turner v. Martin*, 7 De G. M. & G. 429; *Re Sowerby's Trust*, 2 K. & J. 620; *Philips v. Philips*, 3 Hare, 281.

(h) *Lord St. John v. Boughton*, 9 Sim. 219.

(i) See *infra* as to the Statutes of Limitations.

(a) *Jones v. Scott*, 1 R. & M. 255; reversed 4 Cl. & Fin. 382; *Freaker v. Cranefeldt*, 3 M. & Cr. 499; *Evans v. Tweedy*, 1 Beav. 55; *Crallan v. Oulton*, 3 Beav. 1; *Re Hepburn*, 14 Q. B. D. 394. N. B. In *Moore v. Petchell*, 22 Beav. 172, the doctrine established by *Jones v. Scott*, appears to have escaped notice.

tations when the testator leaves no real estate to support the trust.¹

7. **Debt contracted by infant for necessities.**—The terms of the trust will extend to the repayment of a sum of money borrowed by the settlor when an *infant* for the purchase of necessities (*b*).

8. **Case of a mortgagee with covenant for payment.**—Shall a *mortgagee* who has a covenant for payment of his debt be allowed to prove and receive a dividend upon the whole amount of his debt *pari passu* with the other creditors, or shall he prove only for the excess of the debt beyond the value of the security, or what rule is to govern the case? In bankruptcy, the mortgagee proves only for the excess of the mortgage debt over the value of the security, so that he must first dispose of the estate (with the concurrence, if he has no power of sale, of the trustee in bankruptcy), [or assess the value of it,] and then prove for the difference. In the administration of assets in Courts of equity, a mortgagee [was until recently] allowed to prove for his whole debt without being put on terms as to his security (*c*); [but by the Judicature Act, 1875 (*d*), the rule in equity has in insolvent estates been assimilated to that in bankruptcy.] The trust deed usually provides for the case of persons having specific liens, and ingrafts the principle established in bankruptcy. If there be no such clause, and if the deed provide that the creditor shall release his debt and all securities for the same, the mortgagee, by executing the deed, binds himself to the other creditors, notwithstanding any

(*b*) *Marlow v. Pitfield*, 1 P. W. 558.

(*c*) See *Greenwood v. Taylor*, 1 R. & M. 185; *Mason v. Bogg*, 2 M. & Cr. 433; *Rome v. Young*, 4 Y. & C. 204; *Hanman v. Riley*, 9 Hare, App. xli.; *Ex parte Middleton*, 3 De G. J. & Sm. 201. The rule in equity was also held to apply in liquidations of joint stock companies under the Companies' Act, 1862, *Kellock's case*, 3 L. R. Ch. App. 769. [By 38 & 39

Vict. c. 77, s. 10, the rule in bankruptcy has been adopted both in administrations of insolvent estates in Courts of Equity and in liquidations under the Companies' Acts, 1862 & 1867 of joint stock companies. By the Bankruptcy Act, 1883, s. 125, the estate of a person dying insolvent can now be administered in bankruptcy.]

[(*d*) 38 & 39 Vict. c. 77, s. 10.]

¹ *Re Hepburn*, 14 Q. B. D. 394.

private arrangement with the debtor to the contrary, that he will not take advantage of his specific lien, but will bring it into the common stock and prove for his whole debt, and accept a dividend *pari passu* with the rest (*e*). "The moment," observed Lord Lyndhurst, "a creditor releases his debt, which he does by executing a deed of * this kind, there is, of course, an end of any lien he [*522] may have for it" (*a*). But though the word "release" be used in the deed, it will not necessarily operate as an absolute and unconditional release, if the whole contents of the instrument, when taken together, show that such was not the intention (*b*).

9. **Trust for creditors who come in within certain time.**—It was held in *Dunch v. Kent* (*c*) that where there is a trust for payment of such creditors as shall *come in within a year*, a creditor who delays beyond the year is not therefore precluded from taking advantage of the trust; and in *Raworth v. Parker* (*d*), V. C. Wood, after observing that there was no *modern* authority in which relief had been given after the time fixed for the execution of the deed had expired, added, that if it were to be held that creditors are not admissible after the prescribed period, *Dunch v. Kent* must be overruled. And in a more recent case, where the trust was for the benefit of creditors who should execute or accede within three months, the Vice Chancellor held, and the decision was affirmed by the Lord Chancellor on appeal, that a creditor who had not acceded within the prescribed time might claim the benefit of the trust (*e*).

(*e*) *Cullingworth v. Lloyd*, 2 Beav. 385; *Buck v. Shippam*, 1 Ph. 694; 14 Sim. 239.

(*a*) *Buck v. Shippam*, 1 Ph. 697.

(*b*) *Squire v. Ford*, 9 Hare, 47.

(*c*) 1 Vern. 260.

(*d*) 2 K. & J. 170, 171; and see *Collins v. Reece*, 1 Coll. 675; *Jolly v. Wallis*, 3 Esp. 228; *Spottiswoode v. Stockdale*, G. Coop. 102; *Johnson v. Kershaw*, 1 De G. & Sm. 260.

(*e*) *Whitmore v. Turquand*, 1 J. & H. 444; 3 De G. F. & J. 107. V. C. Wood rested his judgment, not on

the authority of *Dunch v. Kent*, but upon general reasoning, and thought that the decision in that case might be accounted for on special grounds; but L. C. in affirming the judgment of the V. C. said that he considered the doctrine of the Court since *Dunch v. Kent*, to have been that a creditor might come in after the time prescribed, and that the time was not of the *essence* of the deed, and that, in his opinion, the view originally taken in *Raworth v. Parker*, by V. C. Wood of *Dunch v. Kent*, was the correct one.

10. **Adoption of deeds.** — It is not necessary that a creditor, to entitle himself to the benefit of the deed, should execute it, but it will be sufficient if he assent to it, or acquiesce in it, or act upon its provisions, and comply with its terms (*f*). But the creditor must do some act to testify his acceptance of the deed, and not merely stand by and remain passive (*g*).

11. **Disputed debt.** — If the trustees permit a person to sign the deed as creditor in a certain sum specified in the schedule, they cannot afterwards contest the debt (*h*). But where there has been fraud, forgery, or perjury by the creditor, the trustees can apply to the Court to have the execution by the creditor set aside (*i*).

[*523] *12. **Trustee cannot arbitrarily admit a creditor who has repudiated the deed.** — A creditor who repudiates the deed by his acts, as by suing the debtor contrary to the provisions of the deed, will not be allowed afterwards (more particularly after a long lapse of time) to retrace his steps and take the benefit of the deed; and though the trustees should admit him to sign the deed, the other creditors will not be bound by the act of the trustees (*a*).

13. **Discretion in trustees to admit creditors' claims.** — A discretion is sometimes given to the trustees to admit or exclude such creditors as they shall think proper. The Court will endeavour, if possible, to withdraw the rights of the creditors from the caprice of the trustees (*b*); but if the settlement clearly give such a discretionary power, and the trustees are willing to exercise it, and no fraud be found, the Court cannot interfere to compel the admission of any particular creditor (*c*).

14. **Relief in equity.** — If the trustees have power of enlarging the time and advertise to that effect, but do not

(*f*) *Field v. Lord Donoughmore*, 1 Dru. & War. 227; *Biron v. Mount*, 24 Beav. 642; *Spottiswoode v. Stockdale*, G. Coop. 102; *Jolly v. Wallis*, 3 Esp. 228.

(*g*) *Biron v. Mount*, 24 Beav. 642.

(*h*) *Lancaster v. Elce*, 31 Beav. 325.

(*i*) *Lancaster v. Elce*, 31 Beav. 328, *per M. R.*

(*a*) *Field v. Donoughmore*, 1 Dru. & War. 227; reversing the decision of Lord Plunket, 2 Dru. & Walsh, 630; *Re Meredith*, 29 Ch. D. 745.

(*b*) See *Nunn v. Wilsmore*, 8 T. R. 521; *Cosser v. Radford*, 1 De G. J. & S. 585.

(*c*) *Wain v. Egmont*, 3 M. & K. 445; *Drever v. Mawdesley*, 16 Sim. 511.

exercise the power, and so exclude a person who desires to come in, but could not do so before the day named in the deed, the creditor will be relieved in equity (*d*).

15. **Resumption by trustees of possession after parting with it.** — If there be trustees for payment of debts and legacies, and subject thereto upon trust for A. for life with remainder over, and the Court has taken an account of debts and legacies, and declared A. entitled to the possession, who is put into possession accordingly, it is not competent for the trustees afterwards to make an admission of some further debt, and to resume the possession in order to discharge it (*e*).

16. **Secret agreements.** — If the debtor agree behind the back of the general creditors, to give an extra benefit to one particular creditor, such agreement is a fraud upon the general creditors, and illegal and void (*f*).

Secondly. As to the order of payment.

1. **Creditors paid before legatees.** — Where the trust is created by *will*, the direction generally is for payment of “debts and legacies.” As regards the administration of assets, creditors take precedence of legatees; but here, as both take under the will, and the testator has made no distinction, it seems upon strict principle, as was formerly held, that creditors *and legatees ought to [*524] be paid *pari passu* (*a*). However, there can be little doubt that the testator, although he may not have explicitly declared it, meant the creditors to precede, and the Courts accordingly (rather straining a point, that a man might not “sin in his grave”) have now indisputably established that creditors shall have the priority (*b*).

(*d*) *Raworth v. Parker*, 2 K. & J. 163. See *ante*, p. 522.

(*e*) *Underwood v. Hatton*, 5 Beav. 36.

(*f*) *Mare v. Sanford*, 1 Giff. 288.

(*a*) *Hixon v. Wytham*, 1 Ch. Ca. 248; *Gosling v. Dorney*, 1 Vern. 482; *Anon.* 2 Vern. 133; *Powell's case*, Nels. 202; *Wolestoncroft v. Long*, 1 Ch. Ca. 32; and see *Walker v. Meager*, 2 P. W. 552.

(*b*) *Greaves v. Powell*, 2 Vern. 248; 302, Raithby's ed.; *Bradgate v. Ridlington*, Mose. 56; 1 Eq. Ca. Ab. 141, pl. 3; *Walker v. Meager*, 2 P. W. 550; *Martin v. Hooper*, Rep. t. Hardwicke, by Ridg. 209; *Whitton v. Lloyd*, 1 Ch. Ca. 275; *Foly's case*, 2 Freem. 49; *Kidney v. Coussmaker*, 12 Ves. 154, per Sir W. Grant; *Peter v. Bruen*, cited 2 P. W. 551; *Lloyd v. Williams*, 2 Atk. 111, per Lord Hardwicke.

2. *All creditors to be paid pari passu.* — As amongst the creditors themselves, the Court acts upon the well-known principle that “equality is equity,” and, therefore, whether the trust be created by deed (*c*) or will (*d*), the specialty debts in the absence of express directions to the contrary will have no advantage over simple contract debts, but all will be paid in ratable proportions; and, of course, the trustees will not be allowed to break in upon the rule of equality by first discharging their own debts (*e*).

3. *Specialty creditors.* — It was formerly ruled, that where a testator charged his freehold estate with debts, and the estate subject to the charge descended to the heir, the specialty creditor had precedence, for it was argued that he had his remedy at law against the heir independently of the will, and therefore ought not to be put on a level with those taking under the will (*f*). The answer is, that the specialty creditor has no *lien* upon the estate, but can only recover the debt from the heir personally to the extent of the assets descended. If the estate be subject to the charge, the heir takes not beneficially but only as trustee, and then there are no legal assets in consideration of equity, and the bond creditor may be enjoined from pursuing his legal right. And on these grounds it has been decided that specialty debts are not entitled to a preference (*g*).

4. *Case of trustee being also executor.* — It was also [*525] thought at one time, that if the estate charged *with the debts was to be administered by the executor, the testator must have meant that the executor should, as in his executorial capacity, observe the legal priorities (*a*); how-

(*c*) *Wolestoncroft v. Long*, 1 Ch. Ca. 32; *Hamilton v. Houghton*, 2 Bligh, 187, *per* Lord Eldon; *Child v. Stephens*, 1 Vern. 101.

(*d*) *Wolestoncroft v. Long*, 1 Ch. Ca. 32; *Anon.* 2 Ch. Ca. 54; &c.

(*e*) *Anon.* 2 Ch. Ca. 54.

(*f*) *Fremoult v. Dedire*, 1 P. W. 429; *Young v. Dennett*, 2 Dick. 462; *Blatch v. Wilder*, 1 Atk. 420; *Allan v. Heber*, Str. 1270; S. C. 1 W. Bl. 22; and see *Plunket v. Penson*, 2 Atk.

290; *Delany v. Delany*, 15 L. R. Ir. 55.

(*g*) *Shiphard v. Lutwidge*, 8 Ves. 26; *Pope v. Gwyn*, cited *Ib.* 28, note; *Bailey v. Ekins*, 7 Ves. 319; *Batson v. Lindegreen*, 2 B. C. C. 94; *Hargrave v. Tindal*, cited *Newton v. Bennet*, 1 B. C. C. 136, note.

(*a*) *Girling v. Lee*, 1 Vern. 63; *Cutterback v. Smith*, Prec. Ch. 127; *Bickham v. Freeman*, *Ib.* 136; *Mas- ham v. Harding*, Bunn. 339; *Foly's*

ever, there was no reason, in fact, why the characters of trustee and executor should not be united in the same person without confusion, and so it has since been determined (*b*). But where the trust was expressly to pay the settlor's debts "according to their priority, nature, and specialty," a bond debt with interest was payable before a simple contract debt (*c*). But now all debts of persons who may have died on or after 1st January, 1870, are payable *pari passu*.

5. **Unclaimed dividends.**—If there be a remnant of *unclaimed dividends* left in the hands of the trustees, it does not belong to the trustees for their own benefit, but will be divisible amongst the unpaid creditors who do claim (*d*).

Thirdly. As to allowance of interest.

1. **Interest not allowed on simple contract debts.**—Whether the trust be created by deed (*e*), or will (*f*), and though the fund has been making interest (*g*), the trustees will not be justified in paying interest upon *simple contract debts* not carrying interest; and *à fortiori*, this is the case where interest is expressly directed as to some particular debts (*h*). Where the trust was *by deed*, but the creditors had not been made parties, Lord Eldon observed, "The mere direction to pay a debt does not infer either contract or trust to pay interest upon debts by simple contract. As to *contract*, the creditors did not execute the deed, and there was nothing to prevent their suing the debtor after the execution; and no *considera-*

case, 2 Freem. 49; *Delany v. Delany*, 15 L. R. Ir. 55.

(*b*) *Prowse v. Abington*, 1 Atk. 482; *Newton v. Bennet*, 1 B. C. C. 135; *Silk v. Prime*, Ib. 138, note; S. C. 1 Dick. 384; *Lewin v. Okeley*, 2 Atk. 50; *Barker v. Boucher*, 1 B. C. C. 140, note.

(*c*) *Passingham v. Selby*, 2 Coll. 405.

(*d*) *Wild v. Banning*, 12 Jur. N. S. 464.

(*e*) *Hamilton v. Houghton*, 2 Bligh, 469, sec 186; *Car v. Burlington*, 1 P. W. 228, as corrected in Cox's ed.; *Barwell v. Parker*, 2 Ves. 364; *Shirley v. Ferrers*, 1 B. C. C. 41; and see

Stewart v. Noble, Vern. & Scriv. 536; *Creuze v. Hunter*, 2 Ves. jun. 165; S. C. 4 B. C. C. 319.

(*f*) *Lloyd v. Williams*, 2 Atk. 108; *Stewart v. Noble*, Vern. & Scriv. 528; *Dolman v. Pritman*, 3 Ch. Rep. 64; *Nels.* 136; *Freem.* 133; *Bath v. Bradford*, 2 Ves. 588, *per* Lord Hardwicke; and see *Tait v. Northwick*, 4 Ves. 816; *Bothomly v. Fairfax*, 1 P. W. 334, note; *Maxwell v. Wettenhall*, 2 P. W. 26, ed. by Cox, are overruled.

(*g*) *Shirley v. Ferrers*, 1 B. C. C. 41; but see *Pearce v. Slocombe*, 3 Y. & C. 84.

(*h*) *Jenkins v. Perry*, 3 Y. & C. 178.

tion was given to the debtor by charging the land and discharging the person" (i). Even where the debts [*526] *did in their nature carry interest, and the direction in a will was to pay "the debts owing by the testatrix's brother at the time of his death," but forty years had elapsed since the death of the brother, so that the interest if allowed would have amounted to more than double the principal, the Court thought the direction could not have been intended to include interest as well as principal (a).

2. **The trust deed does not make the debts specialties.** — It was once suggested by Lord Abinger that "if a man execute a trust of a term for the benefit of his creditors, the deed makes them mortgagees *if they execute it*, and so gives them a right to interest" (b); and it was held in some old authorities, that even in a deed to which the creditors were not parties, or in a trust created by will for payment of debts, the creditors were to be regarded as mortgagees and were entitled to interest (c); but the doctrine in the latter cases has long since been overthrown, and it is apprehended that the distinction taken by the Chief Baron cannot at the present day be supported (d). Again, it was said by Lord Hardwicke that "if a man *by deed* in his life creates a trust for payment of his debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a *specialty*, it will make these, though simple contract debts, carry interest" (e). But this dictum also is not in conformity with the law as now established and cannot be maintained (f).

3. **Pearce v. Sloccombe.** — But where A. and B. assigned their *joint property* to C., D., and E. upon trust, in the first

(i) *Hamilton v. Houghton*, 2 Bligh, 186; and see *Barwell v. Parker*, 2 Ves. 364; *Bath v. Bradford*, Ib. 588.

(a) *Askew v. Thompson*, 4 K. & J. 620.

(b) *Jenkins v. Perry*, 3 Y. & C. 183.

(c) *Maxwell v. Wettenhall*, 2 P. W. 27; *Car v. Burlington*, 1 P. W. 229.

(d) *Barwell v. Parker*, 2 Ves. 364. It must be borne in mind, however, that the practice of the Court in the

Chancery Division gives simple contract creditors a right to interest from the date of the decree out of any surplus assets after paying all debts, and the interest of such as by law carry interest; see rules of Supreme Court, Ord. 55, R. 63.

(e) *Barwell v. Parker*, 2 Ves. 364.

(f) *Stone v. Van Heythuysen, Kay*, 721; *Clowes v. Waters*, 16 Jur. 632.

place to pay the *joint* debts at the expiration of a year from the date of the assignment, and then as to a moiety to pay the *separate* debts of A., and at the end of a year sufficient assets were realised to have discharged the joint debts, but the money, instead of being so applied, was invested in the funds and the interest accumulated, it was held, that as the fund applicable to the payment of the joint debts had been making interest from the time the debts should have been paid, the joint creditors, though on simple contract, were entitled to interest at 4 per cent. before the separate creditors were paid their principal. The separate creditors would otherwise try to impede the general *settle- [*527] ment, in order that, in the meantime, they might enjoy the interest from the joint creditor's fund (a).

4. **Creditors may stipulate for interest.** — The creditors may stipulate for payment of interest, or the settlor, if so minded, may insert such a direction (b). But a trust for payment of specialty and simple contract debts and *all interest thereof*, will not amount to such a direction, but the words will be taken to have reference to the debts carrying interest of their own nature (c).

5. **Specialty debts.** — *Specialty debts*, though actually released by a creditors' deed will carry interest up to the *time of payment*. It might be urged, indeed, that as regards specialty debts the amount of the debt is the principal and interest; and therefore in a trust for payment of debts interest as well as principal must be taken into calculation to ascertain what the debt is at the date of the deed or the death of the testator; but that interest ought not to run beyond the date of the trust deed or the death of the testator, for that principal and interest together are then regarded as one sum, not as a debt but the *claim* of a *cestui que trust*. And some principle of this kind appears to have been acted upon in the case of *Car v. Burlington* (d), where a person vested estates in trustees upon trust to pay all such debts as

(a) *Pearce v. Slocombe*, 3 Y. & C. 84.

(c) *Tait v. Northwick*, 4 Ves. 816.

(d) 1 P. W. 228, as corrected in

(b) See *Bath v. Bradford*, 2 Ves. 588; *Barwell v. Parker*, Ib. 364; *Stew-*

art v. Noble, Vern. & Scriv. 536.

Cox's ed. from Reg. Lib.

he should owe at his death, and the Court directed the Master to calculate interest on such of the debts as carried interest *up to the death of the settlor*; but the Master was not to carry on any interest on any security beyond the settlor's decease, but in case there were assets to pay the simple contract debts as well as the specialty debts, the question of ulterior interest was reserved. At the present day, however, the rule is to consider the specialty debt as subsisting up to the time of payment, *i.e.*, to calculate interest on *the principal* not only up to the date of the deed or the death of the testator, but up to the day of payment (e).

6. **Bond creditors not entitled to interest beyond the penalty.**—Bond creditors, it must be observed, will in no case be entitled to receive more for principal and interest than the amount of the penalty (f).

(e) *Bateman v. Margerison*, 16 Beav. 477.

(f) *Hughes v. Wynn*, 1 M. & K. 20; *Anon.* 1 Salk. 154; *Clowes v. Waters*, 16 Jur. 632.

THE DUTIES OF TRUSTEES OF CHARITIES.¹

1. CHARITIES may either be established by charter, as *eleemosynary corporations*, or may be placed under the management of *individual trustees*.

¹ *Charities and charitable uses*.—The intention of the settlor must be determined whether the trust is public or private, charitable or otherwise; *Olliffe v. Wells*, 130 Mass. 221; but if a trust has been found to be for a charity, different rules apply to it; *Saltonstall v. Sanders*, 11 Allen, 456; *Odell v. Odell*, 10 Allen, 1; *Fontain v. Ravenel*, 17 How. 384. Charities are subject to equitable jurisdiction and construction; *Vidal v. Girard's Ex'rs*, 2 How. 127; *Vidal v. Philadelphia*, 2 How. 128; *Tappan v. Deblois*, 45 Me. 122; *Ould v. Washington Hospital*, 95 U. S. 303; *Jackson v. Phillips*, 14 Allen, 558.

Definition.—"A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature;" *Jackson v. Phillips*, 14 Allen, 556. A "purely public charity" may be one in which the designated beneficiaries are to be all of one particular religious faith, provided that the persons to be benefited are indefinite within the specified class. "Purely" means completely, entirely, unqualifiedly, &c. Public charities may be restricted to a class of people of a state, or city, &c., but must be general for all the class. The test is in the object of the investment, not the public or private gain; *Burd Orphan Asylum v. School Dist. Upper Darby*, 90 Pa. St. 21; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Clement v. Hyde*, 60 Vt. 716; 28 Am. Rep. 522; *Warde v. Manchester*, 56 N. H. 508.

"Whatever is given for the love of God, or for the love of our neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain of everything that is personal, private, or selfish, is a gift for charitable uses." Mr. Binney's argument in the *Girard Will case*, 41; *Price v. Maxwell*, 4 Casey, 23; *Rhymer's App.* 93 Pa. St. 142; *Schnorr's App.* 17 P. F. Smith, 138; *Everett v. Carr*, 59 Me. 325; *Perin v. Carey*, 24 How. 506.

Public charity.—A gift "for the relief of the resident poor" is a charitable bequest; *Howard v. American Peace Soc.* 49 Me. 288; *Swasy v. American Bible Soc.* 57 Me. 523; *Hesketh v. Murphy*, 36 N. J. Eq. 304; *Craig v. Secrist*, 54 Ind. 419; *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278. A

2. *Charities by charter.*—Before entering upon the duties of trustees for charities, it may be proper to introduce a few

limitation to "needy relatives" creates a charitable bequest; *Beardsley v. Selectmen*, 53 Conn. 489; 55 Am. Rep. 152; *Quinn v. Shields*, 62 Ia. 129; 49 Am. Rep. 141; *Sowers v. Cyreniuse*, 39 Ohio St. 29; 48 Am. Rep. 418; *De Campo v. Dobbins*, 29 N. J. Eq. 36; *Webster v. Morris*, 66 Wis. 366; *Suter v. Hilliard*, 132 Mass. 412; 42 Am. Rep. 444. A gift to erect a house of worship may constitute a public charity if there is no definite body for whose use the gift was intended. If definite in its limitations it cannot be a public charity. *Old South Soc. v. Crocker*, 119 Mass. 1; 20 Am. Rep. 298; *Saltonstall v. Sanders*, 11 Allen, 446; *Atty. Gen. v. Federal St. Meeting House*, 3 Gray, 1; *Cong. Soc. v. Waring*, 24 Pick. 304. A corporation, the object of which is to provide for the sick without compensation, is a public charity; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Gooch v. Association for Relief Aged Females*, 109 Mass. 558; *Sanderson v. White*, 18 Pick. 328; *County of Hennepin v. Brotherhood of Gethsemane*, 27 Minn. 460. So is a gift for use of Sabbath-schools for the diffusion of Christian principles as taught and practised by Evangelical denominations; *Morville v. Fowle*, 144 Mass. 109; or for aid of such indigent, needy and meritorious widows and orphans as need temporary help; *Camp v. Crocker*, 54 Conn. 21. Likewise a bequest of money to be "expended in the education of the scholars of poor people; *Clement v. Hyde*, 50 Vt. 716; "for purchase and distribution of such religious books or reading as they shall deem best; *Simpson v. Welcome*, 72 Me. 496; *Drew v. Wakefield*, 54 Me. 291; *Going v. Emery*, 16 Pick. 107; *Bartlet v. King*, 12 Mass. 537. A masonic lodge is not a public charity or benevolent institution; *Bangor v. Masonic Lodge*, 73 Me. 428; 40 Am. Rep. 369; *Bolton v. Bolton*, 73 Me. 299; but see *Indianapolis v. Grand Master*, 25 Ind. 518; *King v. Parker*, 9 Cush. 71; *Duke v. Fuller*, 9 N. H. 536; *Mayor of Savannah v. Solomon's Lodge*, 53 Ga. 93. Such a lodge may receive in trust for charitable purposes; *Everett v. Carr*, 59 Me. 326. Neither is an Odd Fellows' lodge a charitable institution; *Babb v. Reed*, 5 Rawle, 157. For case of an institution of science, see *Delaware Co. Inst. v. Delaware Co.* 94 Pa. St. 163. Gift to church to suppress manufacture and sale of intoxicating liquor is valid; *Haines v. Allen*, 78 Ind. 100; 41 Am. Rep. 555. A gift "for benevolent purposes" is not a public charity; *Chamberlain v. Stearns*, 111 Mass. 267; unless used in connection with charity, when the two words may be regarded as synonymous; *Saltonstall v. Sanders*, 11 Allen, 446; *Rotch v. Emerson*, 105 Mass. 431. A public library may be a public charity; *Donohugh v. Library Co.* 5 Norris, 306; *Miller v. Porter*, 53 Pa. St. 292; *City of Philadelphia v. Girard's Heirs*, 9 Wright, 9; a parochial school not carried on for profit but to which parents are to make contributions as able is a charity; *Gerke v. Purcell*, 25 Ohio St. 229. For the aid and support of those of my children who may be destitute, not a public charity; *Kent v. Dunham*, 142 Mass. 216; *Brattle Sq. Church v. Grant*, 3 Gray, 142; *Thorndike v. Loring*, 15 Gray, 391; *Sears v. Russell*, 8 Gray, 86.

Uncertainty.—Our laws are more strict than the English as to the certainty and definiteness with which the cestuis que trust are named. A bequest to trustee "for any and all benevolent purposes that he may see fit," is void for uncertainty; *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424; but see *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489; so is gift to "next of kin who may be needy;" *Fontaine's Admr. v. Thompson's Admr.* 80 Va. 229;

preliminary remarks upon the subject of the Court's (a) *jurisdiction* over charities established by *charter*.

[(a) By 36 & 37 Vict. c. 66, s. 34, signed to the Chancery Division of causes and matters for the execution the High Court of Justice.]
of Charitable Trusts, are to be as-

56 Am. Rep. 588; so to one "to use and apply the same for such religious and charitable purposes and objects as will in his judgment best promote the cause of Christ;" *Maught v. Getzendanner*, 65 Md. 527; 57 Am. Rep. 352; *Dashiell v. Atty. Gen.* 5 H. & J. 393; *Church v. Smith*, 56 Md. 397. To build a free school house and extend the education of poor children is void; *Stone-street v. Doyle*, 75 Va. 356; *Baptist Asso. v. Hart*, 4 Wheat. 4; and a home for educational purposes and society for christianizing the African race; *Rizer v. Perry*, 58 Md. 112; *Nichols v. Allen*, 130 Mass. 211; *Prichard v. Thompson*, 95 N. Y. 76.

A misnomer in referring to a corporation will not defeat the charity; *Barnum v. Mayor of Baltimore*, 62 Md. 275; 50 Am. Rep. 219; *McAllister v. McAllister*, 46 Vt. 272; *Chapin v. School Dist.* 35 N. H. 445; *Lefevre v. Lefevre*, 59 N. Y. 434; *Minot v. Boston Asylum*, 7 Met. 416. A gift to a charitable institution to be incorporated is valid; *Universalist Soc. v. Kimball*, 34 Me. 424; *Sewall v. Cargill*, 15 Me. 414. A bequest "equally to the authorized agents of the Home and Foreign Missionary Society and to aid in propagating the holy religion of Jesus Christ" is valid; *Hinckley v. Thatcher*, 139 Mass. 477; 52 Am. Rep. 719; *American Tract Soc. v. DeWitt*, 9 Allen, 447; *Tilton v. American Bible Soc.* 60 N. H. 377; *Dunham v. Averill*, 45 Conn. 61. To clergymen "to be expended in the education of children, in such way and manner as they may deem best and the majority approve"; *Grimes' Exrs. v. Harmon*, 35 Ind. 198; *White v. Fisk*, 22 Conn. 31; *Downing v. Marshall*, 23 N. Y. 366. To be distributed "among such Roman Catholic charities, institutions, schools or churches in the city of New York" as the executors may select; this is valid, there being corporations answering the description and empowered to take; *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 559; the beneficiary need not be described by name, it is enough if the beneficiary can be ascertained; *Holmes v. Mead*, 52 N. Y. 332. There must be an ascertainable beneficiary; *Wheeler v. Smith*, 9 How. 55; *Sherwood v. American Bible Soc.* 1 Keyes, 561; *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 53; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269. To executors to distribute the residue among relatives and for beneficial objects in such manner as they deem best is valid; *Goodale v. Mooney*, 60 N. H. 528; 49 Am. Rep. 334. Bequest to an institution to be incorporated for respectable and indigent women, is valid; *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29; *Church v. Mott*, 7 Paige Ch. 77. If possible to reduce such a devise to a certainty it will be done; *Brewster v. McCall*, 15 Conn. 292; *White v. Howard*, 38 Conn. 366; for the support of young men preparing for the ministry is void unless power is given to trustees to make a selection; *White v. Fisk*, 22 Conn. 31; *Washburn v. Sewall*, 9 Met. 280; *Fellows v. Miner*, 119 Mass. 541. There must be a clear distinction noticed between a declaration of a gift and its purposes and the mode of administration; *City of Phila. v. Girard's Heirs*, 45 Pa. St. 9; 84 Am. Dec. 470. A devise to "a public seminary" is a valid charity; *Curling's Admrs. v. Curling's Heirs*, 8 Dana, 38; so is a bequest to a church to be expended yearly for bread for the poor;

3. **Visitor.**—On the institution of such a charity a *visitation* jurisdiction arises of common right to the founder

Witman v. Lex, 17 Serg. & R. 88; *Zeisweiss v. James*, 63 Pa. St. 469. A charity will not be allowed to fail for want of a trustee; *M'Girr v. Aaron*, 1 Pen. & W. 49; 21 Am. Dec. 361; *Levy v. Levy*, 40 Barb. 625; *Starkweather v. American Bible Soc.* 72 Ill. 58; *Heiss v. Murphey*, 40 Wis. 291. Bequest of so much as shall remain at the death of a certain person; *Mills v. Newberry*, 112 Ill. 123; 54 Am. Rep. 213; *Howard v. Carnai*, 109 U. S. 725; to dispose of for such charitable purposes as he thinks proper; *White v. Ditson*, 140 Mass. 351; 54 Am. Rep. 473; it is not material that "in trust" is not found in the bequest; *Schouler v. Peter*, 134 Mass. 426; *Nichols v. Allen*, 130 Mass. 211. A bequest may be valid but the trust void; *Shattuck v. Hastings*, 99 Mass. 23; *Drury v. Natick*, 10 Allen, 183.

Religious societies and uses.—A religious society is not a charitable corporation; *De Wolf v. Lawson*, 61 Wis. 469; 50 Am. Rep. 148. A trust to permit all white religious societies to use land for a common burying ground and no other purpose is void; *Brown v. Caldwell*, 23 W. Va. 187; 48 Am. Rep. 376; *Fairfield v. Lawson*, 50 Conn. 501; *Ayer v. Emery*, 14 Allen, 67; *Sohier v. Trinity Church*, 109 Mass. 1; *Stanley v. Colt*, 5 Wall. 119; for bequests for keeping burial lots in order, see *Bates v. Bates*, 134 Mass. 110; 45 Am. Rep. 305; *Johnson v. Hollifield*, 79 Ala. 423; 58 Am. Rep. 596; *Dexter v. Gardner*, 7 Allen, 243; but see *Piper v. Moulton*, 72 Me. 155. For religious uses, see *Holland v. Peck*, 2 Ired. Eq. 255; *Ruth v. Oberbrunner*, 40 Wis. 238; *Miller v. Teachout*, 24 Ohio St. 525. A gift to the Methodists is good; *Church v. Remington*, 1 Watts, 224; to Friends or Quakers; *Price v. Maxwell*, 28 Pa. St. 23; for the distribution of religious books and reading; *Simpson v. Welcome*, 72 Me. 496; for school "wherein no books of instruction are to be used except the spelling book and the Bible"; *Tainter v. Clark*, 5 Allen, 66. Gift to pay for masses for souls is a religious use; *Rhymer's App.* 93 Pa. St. 142.

Cy pres.—America adopts the English doctrine of *cy pres* in a modified form only; *Grimes' Exrs. v. Harmon*, 35 Ind. 198. *Cy pres* has no existence in New York; *Bascomb v. Albertson*, 34 N. Y. 590; nor Kentucky; *Cromie v. Louisville Soc.* 3 Bush, 375; nor South Carolina; *Pringle v. Dorsey*, 3 Rich. N. S. 509; nor Michigan, Minnesota and Connecticut; *Hughes v. Daly*, 49 Conn. 34; *Methodist Church v. Clark*, 41 Mich. 730; *Little v. Willford*, 31 Minn. 173.

See also *Carter v. Balfour*, 19 Ala. 814; *Byers v. McCartney*, 62 Ia. 339; *State v. Warren*, 28 Md. 338; *Pearsall v. Post*, 20 Wend. 111; *Carpenter v. Miller*, 3 W. Va. 174; *Green v. Allen*, 5 Humph. 170.

For a full discussion of this doctrine, see *Jackson v. Phillips*, 14 Allen, 574; *Moore v. Moore*, 4 Dana, 354; *Wells v. Doane*, 3 Gray, 201; *Loring v. Marsh*, 6 Wall. 337. For latitude allowed by *cy pres*, see *Marsh v. Renton*, 99 Mass. 132; *Carter v. Balfour*, 19 Ala. 814; *Atty. Gen. v. Wallace*, 7 B. Mon. 611; *Curtiss v. Brown*, 29 Ill. 201; *Henry Co. v. Winnebago, &c.* 52 Ill. 454.

Statute of uses.—The statute of 43 Elizabeth has effect in Alabama; *Johnson v. Longmire*, 39 Ala. 143. In Arkansas public charities are not governed by rules as to perpetuities; *Grissom v. Hill*, 17 Ark. 483.

The statute is in force in Connecticut; *Treat's App.* 30 Conn. 113. The local courts control in Georgia; *Walker v. Walker*, 25 Ga. 420. Statute is applied in Illinois and *cy pres* doctrine is limited; *Heuser v. Harris*, 42 Ill.

(whether the Crown or a private person), or to those whom the founder has substituted in the place of himself (*b*); and the office of visitor is to *hear and determine all differences of the members of the society amongst themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed* (*c*). The visitor must take as his guide the statutes originally propounded by the founder (*d*); but so long as he does not exceed his proper province, his decision is final, and cannot be questioned by way of appeal (*e*).

(*b*) *Eden v. Foster*, 2 P. W. 326, *per* Sir J. Strange; *Id.* 472, *per* Lord Hardwicke; *Attorney-General v. Gaunt*, 3 Sw. 148.

(*c*) See *Philips v. Bury*, Skin. 478; *Attorney-General v. Crook*, 1 Keen, 126; *Attorney-General v. Archbishop of York*, 2 R. & M. 468; *Re Birmingham School*, Gilb. Eq. Rep. 180, 181.

(*d*) *Green v. Rutherford*, 1 Ves. 469,

per Sir J. Strange; *Id.* 472, *per* Lord Hardwicke.

(*e*) *St. John's College, Cambridge v. Todington*, 1 Burr. 200, *per* Lord Mansfield; *Attorney-General v. Lock*, 3 Atk. 165, *per* Lord Hardwicke; *Attorney-General v. The Master of Catherine Hall, Cambridge*, Jac. 392, *per* Lord Eldon.

425. So, too, the statute has been reenacted in Indiana, and the *cy pres* doctrine is generously construed; *Grimes v. Harmon*, 35 Ind. 198. The same is true in Iowa; *Miller v. Chittenden*, 4 Ia. 252. Also in Kentucky; *Church v. Church*, 18 B. Mon. 635; *Atty. Gen. v. Wallace*, 7 B. Mon. 611. Statute not in force in Louisiana, but is in Maine; *Swasey v. American Bible Soc.* 57 Me. 526; *Tappan v. Deblois*, 45 Me. 122. Not in force in Maryland; *Needles v. Martin*, 33 Md. 609. Statute is applied in Massachusetts, and *cy pres* doctrine has a comparatively broad scope; *Hosea v. Jacobs*, 98 Mass. 65; *Fairbanks v. Lamson*, 99 Mass. 533; *Atty. Gen. v. Garrison*, 101 Mass. 223. In Michigan charities are no different from other trusts; *Newark Church v. Clark*, 41 Mich. 730. In Missouri and Mississippi the courts administer the charities; *Chambers v. St. Louis*, 29 Mo. 543. In New Hampshire charitable trusts are recognized; *Dublin Case*, 38 N. H. 459; *Chapin v. School Dist.* 35 N. H. 454. Statute has never been in force in New Jersey; *Atty. Gen. v. Moore*, 4 C. E. Green, 503. Charities and *cy pres* are strictly dealt with in New York; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Holmes v. Mead*, 52 N. Y. 339. In North Carolina the courts will not apply the special rules to public, but only to private charities; *Bridges v. Pleasants*, 4 Ired. Eq. 26; *Miller v. Atkinson*, 63 N. C. 537. Statute is in force in Ohio; *American Bible Soc. v. Marshall*, 15 Ohio St. 537. In Pennsylvania the statute is only partially applicable; *McLain v. School Directors*, 51 Pa. St. 196; *Henderson v. Hunter*, 59 Pa. St. 335. Rhode Island adopts a different but similar statute; *Baptist Soc. v. Hail*, 8 R. I. 240. Courts of South Carolina control the matter as they choose; *Atty. Gen. v. Clergy Soc.* 8 Rich. Eq. 190; and Tennessee; *Franklin v. Armfield*, 2 Sneed, 305. In Texas the court controls; *Paschal v. Acklin*, 27 Tex. 173. Statute is applicable in Vermont; *Penfield v. Skinner*, 11 Vt. 296. Statute was repealed in Virginia; *Seaburn v. Seaburn*, 15 Gratt. 423; *Commonwealth v. Levy*, 23 Gratt. 21.

4. **Jurisdiction of the Court over corporate bodies.**— With this *visitatorial* power the Court has nothing to do: it is only as respects the administration of the corporate *property* that equity assumes to itself any right of interference (*f*).

[*529] *5. **Informal election.— Mal-administration.**— Upon the ground of this distinction between the visitatorial power and the management of the revenue, an information for the *removal of governors or other corporators*, as having been irregularly appointed, would be dismissed with costs (*a*); but wherever the administration of the *property* by the governors can be shown to have a tendency to pervert the end of the institution, the Court will immediately interpose, and put a stop to such wrongful application (*b*).

6. **How property newly given is affected by the visitatorial power.**— An estate newly bestowed upon an old corporation is not to be regarded in the same light as property with which the charity was originally endowed. The visitatorial power is *forum domesticum*—the private jurisdiction of the founder; and the new gift will not be made subject to it, unless the will of the donor be either actually expressed to that effect, or is to be collected by necessary implication (*c*).

(*f*) See the observations of Lord Commissioner Eyre in *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. jun. 47. But Chief Baron Richards once observed, he had been of counsel in the Foundling Hospital case, and he remembered some of the first men of the bar were not satisfied with the decision; *In re Chertsey Market*, 6 Price, 272. See also the observations of Lord Hardwicke in *Attorney-General v. Lock*, 3 Atk. 165; and see upon this subject generally *Ex parte Berkhamstead Free School*, 2 V. & B. 138; *The Poor of Chelmsford v. Mildmay, Duke*, 83; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499; *Eden v. Foster*, 2 P. W. 326; *Attorney-General v. Dixie*, 13 Ves. 533, 539; *Attorney-General v. Corporation of Bedford*, 2 Ves. 505; 5 Sim. 578; *Attorney-General v. Browne's Hospital*, 17

Sim. 137; *Attorney-General v. Dedham School*, 23 Beav. 350; *Daugars v. Rivaz*, 28 Beav. 233.

(*a*) *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 498; *Whiston v. Dean and Chapter of Rochester*, 7 Hare, 532; *Attorney-General v. Dixie*, 13 Ves. 519; *Attorney-General v. Middleton*, 2 Ves. 327, see 330; *Attorney-General v. Dulwich College*, 4 Beav. 255; *Attorney-General v. Magdalen College, Oxford*, 10 Beav. 402; *Attorney-General v. Corporation of Bedford*, Id. 505; *In re Bedford Charity*, 5 Sim. 578.

(*b*) See *Attorney-General v. St. Cross Hospital*, 17 Beav. 435; *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. jun. 48; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499.

(*c*) *Green v. Rutherford*, 1 Ves. sen. 472, per Lord Hardwicke.

If a legal or equitable interest be given to a body corporate, and *no special purpose* be declared, the donor has plainly implied that the estate shall be under the general statutes and rules of the society, and be regulated in the same manner as the rest of their property (*d*): but if a *particular and special trust* be annexed to the gift, *that* excludes the visitatorial power of the original founder; and the Court, viewing the corporation in the light of an ordinary trustee, will determine all the same questions as would have fallen under its jurisdiction had the administration of the fund been entrusted to the hands of individuals (*e*).

* 7. **Private foundation with a charter.**—Where a [*530] private person founds a charity, and then the Crown grants a charter, the presumption is that the Crown meant to carry out the founder's intentions, and the jurisdiction of the Court which existed before will be continued (*a*).

8. **Cases where the visitatorial power may be exercised by the Lord Chancellor.**—Even the *visitatorial* power may, under particular circumstances and in a special manner, be exercised by the Lord Chancellor; for the Crown may be visitor by the terms of the foundation; and, if the heir of the founder cannot be discovered (*b*), or become lunatic (*c*), the visitatorial power, rather than that the corporation should not be visited at all, will result to the Crown. And while in *civil* corporations the Crown is visitor through [the High Court of Justice (*d*)]; (for corporate bodies which respect the public policy of the country and the administration of justice, are necessarily better regulated under the superintendence of a Court of law:) yet, as regards *eleemosynary* corporations, the Crown's visitatorial power is committed to the Lord Chancellor, as in matters of charity the more ap-

(*d*) *Id.* 473, *per eundem*; *Ex parte Inge*, 2 R. & M. 596, *per* Lord Brougham; *Attorney-General v. Clare Hall*, 3 Atk. 675, *per* Lord Hardwicke.

(*e*) *Green v. Rutherford*, 1 Ves. sen. 462.

(*a*) *Attorney-General v. Dedham School*, 23 Beav. 350.

(*b*) *Ex parte Wrangham*, 2 Ves. jun. 609; *Attorney-General v. Earl*

of Clarendon, 17 Ves. 498, *per* Sir W. Grant; *Attorney-General v. Black*, 11 Ves. 191; *Case of Queen's College, Cambridge*, Jac. 1.

(*c*) *Attorney-General v. Dixie*, 18 Ves. 519, *see* 533.

[(*d*) This visitatorial power was formerly exercised through the Court of Queen's Bench, but by 36 & 37 Vict. c. 66, the jurisdiction of the

propriate supervisor (*e*). And the mode of application to the Lord Chancellor in these cases is by petition to the Great Seal (*f*).

We now proceed to the consideration of the *duties* of trustees of charities.

9. **Fund must be applied to the charity prescribed.** — It is of course imposed upon the trustees, whether individuals or a corporation, not to convert the charity fund to other uses than according to the intent of the founder or donor; so long as those uses are capable of execution (*g*). Thus if the gift be to find a preacher in Dale, it would be a breach

of trust to provide one in Sale; if it be to find a [*531] preacher, it would be a breach of trust to apply it * to the poor (*a*): if the trust be for the poor of O., it would be a breach of trust to extend it to other parishes (*b*): if the trust be to repair a chapel, the rents must not be mixed up with the poor-rate for parochial purposes (*c*): if a fund be raised for erecting a hospital, it cannot be diverted to lighting, paving, and cleansing the town (*d*).

10. **Chapel for school.** — A chapel was granted to the trustees of a *school* for the use and benefit of the said school, and though the inhabitants of the hamlet had been long accustomed to attend divine service in the chapel, it was

Court of Queen's Bench was transferred to the High Court of Justice, and by s. 34 of that Act, matters which were formerly within the exclusive cognizance of the Court of Queen's Bench have been assigned to the Queen's Bench Division of the Court.]

(*e*) *King v. St. Catherine's Hall*, 4 T. R. 233, see 244; and see *Ex parte Wrangham*, 2 Ves. jun. 619. [By 36 & 37 Vict. c. 66, s. 17, the visitatorial jurisdiction of the Lord Chancellor is reserved to him and is not transferred to the High Court of Justice or the Court of Appeal.]

(*f*) See the cases cited in notes (*b*) and (*c*); and *Ex parte Inge*, 2 R. & M. 594; *Re Queen's College, Cambridge*, 5 Russ. 54; *Re University College, Oxford*, 2 Ph. 521.

(*g*) See *Attorney-General v. Sherborne School*, 18 Beav. 256; *Attorney-General v. Calvert*, 23 Beav. 248; *Attorney-General v. Corporation of Rochester*, 5 De G. M. & G. 797; *In re Stafford Charities*, 25 Beav. 28; *Attorney-General v. Boucherett*, 25 Beav. 116; *Attorney-General v. Gould*, 28 Beav. 485; *Ward v. Hipwell*, 3 Giff. 547.

(*a*) *Duke*, 116; *Attorney-General v. Newbury Corporation*, C. P. Coop. Cases, 1837-38, 72; *Attorney-General v. Goldsmiths' Company*, *Ib.* 292; and see *Wivelscom case*, *Duke*, 94.

(*b*) *Attorney-General v. Brandreth*, 1 Y. & C. C. 200.

(*c*) *Attorney-General v. Vivian*, 1 Rurs. 226, see 237.

(*d*) *Attorney-General v. Kell*, 2 Beav. 575.

held that, as the chapel was for the exclusive benefit of the school, the trustees had no power to apply the revenues of the charity towards enlarging the chapel for the better accommodation of the inhabitants (e).

11. **Chapel pulled down.** — The trustees for maintaining a *chapel* had pulled down the edifice, converted the burial ground to profane purposes, carried the bell to the market-place, put the pews in the parish church, and employed the stones of the chapel for repairing a bridge. Sir T. Plumer said, "It was an enormous breach of trust, and such as could not have been expected in a Christian country;" and directed an inquiry what emoluments had come to the hands of the trustees on account of the breach of trust, and what would be the expense of restoring the chapel to the state in which it stood at the time of its destruction (f).

12. **Charity in aid of rates.** — A fund in aid and relief of "*poor citizens* who often were grievously burdened by the imposts and taxes of the city" was held not to be applicable to the payment of rates and other expenses of the city that would otherwise have been raised by public levies and impositions; nor to be distributable to such of the poor as received parish relief, for that would be so much in aid of the ratepayers; but ought to have been administered for the exclusive benefit of the poor (g).

13. **Poor of a parish.** — Where a trust is created for the "*poor of a parish*," it was for a long time doubted what class of persons was entitled to the benefit. Lord Eldon thought, that the fund should be *administered [*532] without reference to parochial relief; for assistance might be given to a pauper without exonerating the rich from their usual contribution to the rates — to the relief, which the law had provided, further relief might be added,

(e) *Attorney-General v. Earl of Mansfield*, 2 Russ. 501.

(f) *Ex parte Greenhouse*, 1 Mad. 92; reversed on technical grounds, 1 Bligh, N. S. 17.

(g) *Attorney-General v. Corporation of Exeter*, 2 Russ. 45; S. C. 3 Russ. 395; and see *Attorney-General v. Wilkinson*, 1 Beav. 372; *Attorney-General v. Bovill*, 1 Ph. 702; *Attorney-General v. Blizard*, 21 Beav. 233.

which the parish was not bound to afford (a): besides, the appropriation of the fund to the poor not in receipt of parochial relief might still have the effect of conferring a benefit on the rich; for persons who could not otherwise have maintained themselves might, by means of the charity, be prevented from seeking assistance from the rate (b). However, it has been determined in several cases, and seems, therefore, to be now settled, that the charity must be confined to those *not in receipt of parochial relief* (c) (1).

[*533] * 14. Trust for maintaining "the worship of God." —

If land or money be given for maintaining "*the worship of God*" (a), or the promotion of "*Godly learning*" (b),

(a) Attorney-General v. Corporation of Exeter, 2 Russ. 51-54.

(b) See S. C. 3 Russ. 397.

(c) Attorney-General v. Corporation of Exeter, 2 Russ. 47; S. C. 3 Russ. 359; Attorney-General v. Wilkinson, 1 Beav. 372; Attorney-General v. Bovill, M. R. 1 July, 1839. But see Attorney-General v. Bovill, 1 Ph. 768, where Lord Cottenham is reported to have said, "I am inclined to think that the right course is, to

administer the charity, and leave to chance to what extent it may operate to the relief of the poor-rates." The decree, however, seems in the main to be in accordance with the previous decisions; and see Attorney-General v. Blizard, 21 Beav. 233.

(a) Attorney-General v. Pearson, 3 Mer. 409.

(b) *Re Ilminster School*, 2 De G. & J. 535.

(1) 59 G. 3, c. 12. — As to *parish property*; by the effect of the decisions on 59 Geo. 3, c. 12, s. 17, all hereditaments belonging to the parish at the time of the Act, or subsequently acquired, whether for a chattel (*Alderman v. Neate*, 4 M. & W. 704) or freehold interest, and though originally conveyed to express trustees for parish purposes, if it be unknown or uncertain in whom the legal estate is vested (*Doe v. Hiley*, 10 B. & C. 885; and see *Churchwardens of Deptford v. Sketchley*, 8 Q. B. 394), or generally where it is unascertained in whom the legal estate is outstanding, but the parish have exercised all the rights of ownership, and the property belongs to them in the popular sense (*Doe v. Terry*, 4 Ad. & Ell. 274; *Doe v. Cockell*, Ib. 478), are now transferred to the churchwardens and overseers of the parish, not indeed as a corporation and having a common seal (*Ex parte Annesley*, 2 Y. & C. 350), but as persons taking, by parliamentary succession, in the nature of a corporation (*Smith v. Adkins*, 8 M. & W. 362).

The Act does not extend to *copyholds* (*Attorney-General v. Lewin*, 8 Sim. 366; *In re Paddington Charities*, Ib. 629), nor to freeholds of which the trusts are not exclusively for the parish, but also embrace other objects (*Allason v. Stark*, 9 Ad. & Ell. 255; *Attorney-General v. Lewin*, 8 Sim. 366; *In re Paddington Charities*, Ib. 629); nor to lands vested in existing trustees, and who are actually in discharge of their duties in that character (*Churchwardens of Deptford v. Sketchley*, 8 Q. B. 394, overruling *Rumball v. Munt*, Ib. 382; and see *Goulsworth v. Knight*, 11 M. & W. 337). However, though *all* the trusts must be for the parish, they may be directed to some special trust, if exclu-

and nothing more is said, the Court will execute the trust in favour of the established form of religion; and dissenters cannot be appointed trustees (*c*). But though the *trustees* of a Church of England school must be members of the Established Church, it does not follow that the children of dissenters are not to be admitted into the *school*, or even that the *master* may not be a dissenter, though the latter appointment could only be justified by peculiar circumstances (*d*). If it be clearly expressed upon the deed or will that the purpose of the settlor is to promote the maintenance of *dissenting* doctrines, the Court, provided such doctrines be not contrary to law, will execute the intention (*e*).

15. **Numerous contributors.** — Where a fund has been raised for the purpose of founding a chapel or any other charity, and the contributors were so numerous as to preclude the possibility of their all concurring in any instrument declaring the trust, and a declaration of trust was made by the persons in whom the property was vested at or about the time when the sums were raised, that declaration may reasonably be taken *prima facie* as a correct exposition of the minds of the contributors (*f*).

16. **The trust originally intended will be preserved.** — Where an institution exists for the purpose of religious worship, and it cannot be discovered from the instrument declaring the trust what form or species of religious worship was in the intention of the settlors, the Court will then inquire what

(*c*) *Re Stafford Charities*, 25 Beav. 28; *Re Ilminster School*, 2 De G. & J. 535; S. C. *nom.* *Baker v. Lee*, in D. P. 8 H. L. Cas. 495; *Attorney-General v. Clifton*, 32 Beav. 596.

(*e*) *Attorney-General v. Pearson*, 3 Mer. 409, *per* Lord Eldon; see S. C. 7 Sim. 290.

(*f*) *Attorney-General v. Clapham*, 4 De G. M. & G. 626.

(*d*) *Attorney-General v. Clifton*, 32 Beav. 596.

sively parochial, as a trust for aiding the church-rates (*Doe v. Hiley*, 10 B. & C. 855; *Doe v. Terry*, 4 Ad. & Ell. 274; and see *Allason v. Stark*, 9 Ad. & Ell. 266, 267; *Doe v. Cockell*, 4 Ad. & Ell. 478), or furnishing a poor-house (*Alderman v. Neate*, 4 M. & W. 704), or for the relief of the poor of the parish, whether the objects of the charity be or be not held to include those in the receipt of parochial relief; for if non-recipients only of parochial relief are to be admitted, the parish is still benefited by keeping that class of poor, by means of the charity, off the parish books (*Ex parte Annesley*, 2 Y. & C. 350; *Churchwardens of Deptford v. Sketchley*, 8 Q. B. 394).

has been the *usage* of the congregation; and, if such usage do not contravene public policy, will be guided by it as evidence of the intention in the administration of the trust. And by 7 & 8 Vict. c. 45, s. 2, if the instrument of trust do not in express terms, or by reference to some book or other document, define the religious doctrines, twenty-five years' usage immediately preceding any suit is made conclusive evidence thereof (*g*). But if the purpose of the settlors appear clearly upon the instrument, the Court, in that case, though the usage of the congregation [*534] may have run in a different channel, *cannot change the nature of the original institution: it is not competent for the majority of the congregation, or for the managers of the property, to say, "We have altered our opinions: the chapel in future shall be for the benefit of persons of the same persuasion as ourselves" (*a*).

17. **Appointment of new trustees.** — If the deed of endowment neither provide for the succession of *trustees* nor the election of the *minister*, an inquiry will be directed, who, according to the nature of the establishment, are entitled to propose trustees, and to elect the minister (*b*); and if the election of the minister properly belong to the congregation, the majority is for that purpose the congregation (*c*). The appointment of the minister cannot, in such a case, belong to the heir of the surviving trustee, who may not be of the same persuasion, but, it might happen, a Roman Catholic or Jew (*d*).

Notices. — For the valid election of a minister due notice

(*g*) See Attorney-General v. Hutton, Drur. 530. As to Roman Catholic Charities, see 23 & 24 Vict. c. 134, s. 5.

(*a*) Attorney-General v. Pearson, 3 Mer. 400, per Lord Eldon; Foley v. Wontner, 2 J. & W. 247, per eundem; Craigdallie v. Aikman, 1 Dow's P. C. 1; Milligan v. Mitchell, 3 M. & Cr. 73; Broom v. Summers, 11 Sim. 353; Attorney-General v. Murdoch, 7 Hare, 445; 1 De G. M. & G. 86; Attorney-General v. Munro, 2 De G. & Sim.

122; Attorney-General v. Corporation of Rochester, 5 De G. M. & G. 797.

(*b*) Davis v. Jenkins, 3 V. & B. 151, see 159; and see Leslie v. Birnie, 2 Russ. 114. The 13 & 14 Vict. c. 28, seems to confer a power of appointing new trustees, for the *special purposes of that Act*, where there is no power or the power has lapsed.

(*c*) Davis v. Jenkins, 3 V. & B. 155; and see Leslie v. Birnie, 2 Russ. 114.

(*d*) Davis v. Jenkins, 3 V. & B. 155.

of the meeting for the purpose must be given, and no persons must take part in the proceedings who are not entitled to attend (*e*).

18. **Minister of a meeting-house.** — A minister in possession of a meeting-house is tenant at will to the trustees, and his estate is determinable by demand of possession without any previous notice (*f*). But this merely tries the *legal* right without affecting the question whether in *equity* the minister was properly deprived (*g*), and if the minister be in possession, and preaching the doctrines that were intended by the founders, it is the practice of a Court of Equity to continue him until the case can be heard, whether he was duly elected or not (for the first point is to have the service performed), and the Court will pay him his salary (*h*). If a minister be removable by the decision of the congregation regularly convened at a meeting, * the charges [*535] intended to be brought against the minister must be specified in the notice calling the meeting, and the minister himself must be apprised of the nature of the charges (*a*).

19. **Minister may be removable at pleasure.** — It is the policy of the Established Church by giving the minister an estate for life in his office to render him in some degree independent of the congregation; but if it be the usage amongst any particular class of dissenters to appoint their ministers for limited periods, or to make them removable at pleasure, though a Court of Equity might not struggle hard in support of such a plan, there is no principle upon which the Court would not be bound to give it effect (*b*). And, accordingly, where a decided majority of the congregation passed a reso-

(*e*) *Perry v. Shipway*, 4 De G. & J. 363, see 360.

(*f*) *Doe v. Jones*, 10 B. & C. 718; *Doe v. M'Kaeg*, 10 B. & C. 721; *Perry v. Shipway*, 1 Giff. 10; and see *Brown v. Dawson*, 12 Ad. & Ell. 624. See *post*, p. 537.

(*g*) See *Doe v. Jones*, 10 B. & C. 721.

(*h*) *Foley v. Wontner*, 2 J. & W. 247, *per* Lord Eldon. By 32 & 33

Vict. c. 110, s. 15, the powers of the Charity Commissioners, as to the appointment and removal of trustees, are extended to "buildings registered as places of meeting for religious worship."

(*a*) *Dean v. Bennett*, 6 L. R. Ch. App. 489.

(*b*) *Attorney-General v. Pearson*, 3 Mer. 402, 403, *per* Lord Eldon.

lution for the removal of their pastor, the Court granted an injunction against his officiating (*c*).

20. **Original intention cannot be defeated by bye-laws.** — To every corporation there belongs of common right the power of establishing *bye-laws* for the government of their own body; but this privilege cannot authorise the enactment of any rules or regulations that would tend to pervert or destroy the directions of the original founder and the objects of the charity (*d*). And so a clause in a deed investing the trustees, or the major part of them, with the power of making orders from time to time upon matters relating to a meeting-house would not enable them to convert the meeting-house, whenever they thought proper, into a meeting-house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended (*e*).

21. **Mistake.** — It is not the custom of the Court to remove objects of a charity who have been elected under a *mistake*, where the election was *bonâ fide* and without any fraud or corruption (*f*).

22. **Act of Parliament necessary for the purpose of changing the trust.** — The charity funds cannot be diverted into a *different* channel without the authority of Parliament (*g*), either directly by a special Act or indirectly through the Charity Commissioners, who are now empowered to approve, provisionally, of a scheme varying from the original endowment, with a view to submit it to Parliament for its sanction (*h*).

23. **Expenses of an Act.** — Formerly trustees, before [*536] applying to the legislature, were in * the habit of procuring the sanction of the Court of Chancery for their greater security; for if they took such a step upon the mere suggestion of their own minds, and failed in obtaining the

(*c*) *Cooper v. Gordon*, 8 L. R. Eq. 249.

(*d*) *Eden v. Foster*, 2 P. W. 327, resolved.

(*e*) *Attorney-General v. Pearson*, 3 Mer. 411, *per* Lord Eldon.

(*f*) *Re Storie's University Gift*, 2 De G. F. & J. 529, see 531, 540.

(*g*) *Attorney-General v. Market Bosworth School*, 35 Beav. 305.

(*h*) 16 & 17 Vict. c. 137, ss. 54–60. [And see 37 & 38 Vict. c. 87, which transfers the powers of the late Endowed Schools Commissioners to the Charity Commissioners.]

contemplated Act, they were not allowed the costs and expenses incurred in the proceeding (*a*); but if the application to Parliament was attended with success, the trustees were then allowed their costs, though the sanction of the Lord Chancellor had not been previously obtained; for the Court could not with propriety pronounce those measures to be imprudent which the legislature itself had enacted as prudent (*b*).

24. Letter may be broken and yet the spirit preserved.—The management of the trust may contravene the *letter* of the founder's will, and yet, on a favourable construction, be conformable to the intention.

Free grammar school.—It was the opinion of Lord Eldon (*c*) and Sir T. Plumer (*d*), that if the wish of the founder was to establish a *free grammar school*, the Chancellor, though he felt perfectly convinced that a free grammar school (that is, a school for teaching the learned languages) could be of little or no use, would yet be bound to apply the revenue as the donor had directed, and could not substitute a school for teaching English and writing and arithmetic. But it has since been held by Lord Lyndhurst (*e*), Sir John Leach (*f*), Lord Langdale (*g*), and Lord Cottenham (*h*), that the Court has jurisdiction to extend the application of the charity fund to purposes beyond the *literal* intention, and that *writing and arithmetic* may be well introduced into a scheme for the establishment or better regulation of a free grammar school.

Free school.—And this may of course be done in the case not of a *free grammar school*, but of a *free school* (*i*).

3 & 4 Vict. c. 77.—By 3 & 4 Vict. c. 77, the system of

(*a*) Attorney-General v. Earl of Mansfield, 2 Russ. 519, *per* Lord Eldon.

(*b*) *Ib. per eundem.*

(*c*) Attorney-General v. Whiteley, 11 Ves. 241; Attorney-General v. Earl of Mansfield, 2 Russ. 501.

(*d*) Attorney-General v. Dean of Christchurch, Jac. 474.

(*e*) Attorney-General v. Haberdashers' Company, 3 Russ. 530.

(*f*) Attorney-General v. Dixie, 2 M. & K. 432; Attorney-General v. Gascoigne, Id. 652.

(*g*) Attorney-General v. Caius College, 2 Keen, 150; Attorney-General v. Ladyman, C. P. Coop. Cases, 1737-38, 180.

(*h*) Attorney-General v. Stamford, 1 Ph. 745.

(*i*) Attorney-General v. Jackson, 2 Keen, 541.

education in any *grammar school* is extended to other useful branches of literature and science, in addition to or in lieu of the Greek and Latin languages, or such other instruction as may be required by the terms of the foundation, or the existing statutes.

25. **32 & 33 Vict. c. 56.** — By the Endowed Schools [*537] Act, 1869, (32 & 33 Vict. c. 56), * the Commissioners appointed by Her Majesty to inquire into Schools were empowered, by sect. 9, “in such manner as might render any educational endowment most conducive to the advancement of education, to *alter* and *add* to any existing, and to make any *new* trusts, directions, and provisions in lieu of any existing trusts, directions, and provisions.” But by sect. 14, the Act was not to apply to charities created less than fifty years before the commencement of the Act, unless the governing body of the endowment assented to the new scheme. By 37 & 38 Vict. c. 87, the powers of the Endowed Schools Commissioners have been transferred to the Charity Commissioners, and certain amendments of the law have been introduced.

[26. **London Parochial Charities Act.** — By the City of London Parochial Charities Act, 1883 (*a*), the Charity Commissioners are empowered “to inquire into the nature, tenure, and value of all the property and endowments” of certain parochial charities of the City of London, and to prepare schemes for “the future application and management of the charity property and endowments.” But by sect. 21, no scheme is to affect any endowment originally given to charitable uses less than fifty years before the commencement of the Act unless the governing body assent to the scheme. By sect. 39, power is given to the Commissioners to direct the sale of any part of the charity property upon such terms and conditions, and to such purchasers, as they may think fit; and the trustees for the time being of such property are thereupon to effect such sale. By sect. 48, a new corporate governing body to be called “The Trustees of the London Parochial Charities” is to be established, with perpetual succession and a common seal.]

[(*a*) 46 & 47 Vict. c. 36.]

27. **Ejectment of person ceasing to be schoolmaster.**—A schoolmaster or other officer of the trustees, whose appointment has been cancelled or whose office has otherwise ceased, and who in defiance of the trustees continues to hold over the premises given up to him, cannot, as he was lawfully put in possession, be treated on the footing of a trespasser on another's lawful possession, so as to be removable with as little force as may be necessary; but can be ejected in a summary way by application to two justices of the peace under the provisions of 23 & 24 Vict. c. 136, s. 13.

28. **"Finding a master."**—Where the trustees were directed to apply the rents "towards the necessary *finding a master*, and for the pains of such master," and the trustees applied part of the revenue towards *rebuilding and repairing* the school-room and school-house, it was held to be a good execution of the trust, because a school-room and house * were necessary, and if these were not pro- [*538] vided by the trustees they must have been provided by the master himself, and so it was in effect applied for the pains of. the master (a).

29. **"Relief of poor."**—So a trust "for the *relief of the poor*" has been construed to authorise an application of the funds to the building of a *school-house*, and the *education of the poor* of the parish (b).

30. **Repairing and rebuilding.**—So where an estate had been given to trustees for the *repair* of a church and chapel of ease thereto belonging, and the parish had taken down the chapel to erect a new one on a different site, it was determined that the trustees had not exceeded the line of their duty in expending the accumulated rents upon the *rebuilding* of the chapel; but it was held that the *rents* only, and not the *corpus* of the estate, could be so applied; and the Court had great doubt whether anything could be laid out upon the *fitting-up* of the chapel (c). But where there was a large surplus fund and the objects of the charity were sufficiently

(a) *Attorney-General v. Mayor of Stamford*, 2 Sw. 592.

(b) *Wilkinson v. Malin*, 2 Tyr. 544, see 570.

(c) *Attorney-General v. Foyster*, 1 Anst. 116. See *post*, p. 575.

provided for, the Court in a special case made repairs and improvements out of the *capital*, without any direction for recouping the capital out of the income (*d*).

31. **Augmentation of salaries.** — Where the direction of the founder was that the master of a school should receive 50*l.* a year, and the usher 30*l.*, and the trustees had raised the salaries respectively to 80*l.* and 60*l.*, as the will did not contain any prohibition against increasing the salaries, and it could not be supposed that the trustees were not under any circumstances to alter the amount, the Court refused to compel the trustees to refund the augmentations (*e*).

32. **Reduction of salaries.** — And, *vice versa*, if a fund be given, not for the purposes of individual benefit, but for the discharge of certain duties, as for the support of a school-master, and the fund increases to such an extent as to yield more than a reasonable compensation for the duties to be performed, the Court will not allow the surplus to be expended unnecessarily, but will order it to be applied for the promotion of some other charitable purpose (*f*).

33. **Loans.** — Legacies had been left by several different testators (between the years 1545 and 1666) for the purpose of being lent out in sums varying from 5*l.* to 200*l.* without interest; and Sir J. Leach was of opinion, that, regard [*539] being had to the alteration in the value of * money, it was not inconsistent with the intention of the testators to raise the loans to sums varying from 100*l.* to 500*l.* (*a*).

34. **"Parishioners."** — Where the trust was to elect children, who or whose parents were *parishioners* of a certain parish, to Christ's Hospital, it was held by V. C. Malins, that the word "parishioner" must be taken in an honest and *bonâ fide* sense, and could not be applied to a person who had taken a small house temporarily for the mere purpose of ob-

(*d*) *Re Willenhall Chapel*, 2 Dr. & Sm. 467.

(*e*) *Attorney-General v. Dean of Christchurch*, 2 Russ. 321.

(*f*) *Attorney-General v. Master of Brentwood School*, 1 M. & K. 376, 394.

(*a*) *Attorney-General v. Mercers' Company*, 2 M. & K. 654; and see *Attorney-General v. Holland*, 2 Y. & C. 683; *Morden College case*, cited *Ib.* 701, 702.

taining a qualification, and had been rated to the parish collusively, and that where a disqualified candidate was elected after notice to the electors of such disqualification, the votes were thrown away, and that the opposing candidate, though he had a minority of votes, was duly elected (*b*). But on appeal Lord Justice James observed, that if the law allowed a man to be qualified, he was qualified however his qualification might have been gained — that men constantly acquired qualifications for voting in counties by buying a 40*s.* freehold for the sole purpose of giving themselves votes, and the decree of the Court below was reversed (*c*).

35. **Retainer of the charity fund.** — It need scarcely be remarked that a trustee would be guilty of a gross breach of trust, should he keep the charity fund in his hands, and not apply it, as it becomes payable, to the objects of the trust (*d*).

36. **Alienation of the charity estate.** — Trustees of charities could not as a general rule, even before the restrictions recently imposed, have made an absolute disposition of the charity estate: they could not, for instance, have parted with *lands* to a purchaser, and have substituted instead the reservation of a *rent* (*e*). And as the trustees could not have aliened absolutely, so they could not have accomplished the same end indirectly by demising for long terms of years as for 999 years (*f*); or for terms of ordinary duration, with covenants for perpetual renewal (*g*): or by granting reversionary terms (*h*).

37. **Where allowable.** — But there was no positive rule that in *no* instance could an absolute disposition be made, for then the Court itself could not have authorised such an act — a jurisdiction which, it is *acknowledged, has [*540] from time to time been exercised in special cases.

(*b*) *Etherington v. Wilson*, 20 L. R. Eq. 608.

(*c*) 1 Ch. D. 160.

(*d*) *Duke*, 116.

(*e*) *Attorney-General v. Kerr*, 2 Beav. 420; *Blackston v. Hemsworth Hospital*, *Duke*, 49; *Attorney-General v. Brettingham*, 3 Beav. 91; and see *Attorney-General v. Buller*, *Jac.*

412; *Attorney-General v. Magdalen College*, 18 Beav. 223.

(*f*) *Attorney-General v. Green*, 6 Ves. 452; *Attorney-General v. Pargeter*, 6 Beav. 150.

(*g*) *Lydiatt v. Foach*, 2 Vern. 410; *Attorney-General v. Brooke*, 18 Ves. 326.

(*h*) See *Attorney-General v. Kerr*, 2 Beav. 420.

"I do not doubt," observed Sir J. Wigram, "the existence of this power in Court: the trustees have the power to sell at law, they can convey the legal estate, but it is only a Court of equity that can recall the property, and if that Court should sanction a sale it would be bound to protect the purchaser" (*a*). The true principle was, that an absolute disposition was then only to be considered a breach of trust when the proceeding was inconsistent with a provident administration of the estate for the benefit of the charity (*b*). And the transaction was strongly assumed to be improvident as against a purchaser until he had established the contrary (*c*).

38. **Recent charity Acts.**—Now under the provisions of the recent Acts the Commissioners of Charities are empowered on application made to them to authorise the *sale* or *exchange* of any part of the charity property (*d*), and the trustees are restricted from any sale, mortgage or charge, *without the consent* of the Commissioners (*e*).

Sales to railway companies.—But this does not interfere with the powers of trustees of charities to sell under *railway* and other *public Acts*, where the legislature has made proper provision for the due application of the purchase-monies (*f*).

39. **Power of trustees to pass the legal estate.**—By another Act, "a majority of two-thirds of the trustees of any charity

(*a*) Attorney-General *v.* Mayor of Newark, 1 Hare, 400; and see *Re Ashton Charity*, 21 Beav. 288; Anon. case, cited Attorney-General *v.* Warren, 2 Sw. 300, 302.

(*b*) See Attorney-General *v.* Warren, 2 Swans. 302; S. C. Wils. 411; Attorney-General *v.* Hungerford, 8 Bl. 437; S. C. 2 Cl. & Fin. 357; Attorney-General *v.* Kerr, 2 Beav. 428; Attorney-General *v.* South Sea Company, 4 Beav. 543; Attorney-General *v.* Newark, 1 Hare, 395; Parke's Charity, 12 Sim. 320; *Re Suir Island Female Charity School*, 3 Jon. & Lat. 171.

(*c*) Attorney-General *v.* Brettingham, 3 Beav. 91.

(*d*) 16 & 17 Vict. c. 137, s. 24; 18 & 19 Vict. c. 124, s. 32; see 23 & 24

Vict. c. 136, s. 16. The 16 & 17 Vict. c. 137, s. 21, authorises improvements with the sanction of the Charity Commissioners; and the 23 & 24 Vict. c. 136, s. 15, authorises the application of charity monies to "any other purpose or object" which the Commissioners may think beneficial, and which is not inconsistent with the foundation.

(*e*) 18 & 19 Vict. c. 124, s. 29. [The power of the Commissioners to authorise a sale of land falling under the provisions of the Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), is not affected by that Act, *Parish of Sutton to Church*, 26 Ch. D. 173.]

(*f*) See the language of 18 & 19 Vict. c. 124, s. 29.

assembled at a meeting of their body duly constituted, and *having power to determine on any sale, exchange, partition, mortgage, lease, or other disposition* of any property of the charity," are empowered to pass the *legal estate* for giving effect to such disposition (*g*).

40. **Re-investment of sale monies.**—Where a sale or exchange is effected under the Charity Acts, the purchase or exchange monies may be laid out with the consent of the Commissioners in the purchase of other lands *without a licence * in mortmain* (*a*). But the Act is silent [*541] as to the requirement of 9 G. 2, c. 36, and the conveyance should therefore be by deed indented attested by two witnesses, and inrolled in Chancery within six calendar months (*b*).

41. **Investment of accumulations in land.**—Where there are *accumulations* from a charity estate, the Court, considering the purchase of *land* with personal estate belonging to charity to be opposed to the general policy of 9 G. 2, c. 36, will not as a general rule sanction such an investment (*c*). But there is nothing *illegal* in such an investment, if accompanied with the formalities required by the Mortmain Act; and therefore should a highly beneficial purchase offer itself, the trustees themselves would, it is conceived, run no risk in so investing the accumulations (*d*). Indeed the Court itself has made such orders where the purchase of the land was not the main object, but incidental to a general scheme as for the enlargement of a school (*e*). But in every case where land *comes into mortmain for the first time*, the conveyance must be by indenture sealed and delivered in the presence of two credible witnesses, and inrolled within six calendar months from the execution (*f*).

Inrolment.—Even where the land of a charity, whether

(*g*) 23 & 24 Vict. c. 136, s. 16; and see the still later enactment of 32 & 33 Vict. c. 110, s. 12, *post*, p. 547.

(*a*) 18 & 19 Vict. c. 124, s. 35.

(*b*) As to these requirements, see *ante*, p. 96.

(*c*) Attorney-General v. Wilson, 2 Keen, 680.

(*d*) See Vaughan v. Farrer, 2 Ves. 188.

(*e*) Attorney-General v. Mansfield, 14 Sim. 601; Honnor's Trust, V. C. Kindersley, May 3, 1853.

(*f*) But see Attorney-General v. Day, 1 Ves. sen. 222. As to purchases before 25 July, 1828, see 9 G. 4, c. 85.

vested in the corporation or in trustees, is taken by a public company, and the purchase-money is laid out under the direction of the Court in the purchase of other lands upon the like trusts, the deed must be *inrolled* (g).

42. **Loans of charity money on mortgage.**—Trustees of a charity may lend the trust fund upon a *mortgage* of real estate, though a legal condition is expressly reserved, and though after default an equity of redemption arises by the rules of equity. The Statute of Mortmain (9 Geo. 2, c. 36) which avoids conveyances to a charity containing any reservation or condition for the benefit of the grantor, is held not to apply to such a case (h). But of course care should be taken that the mortgage is by indenture attested by two witnesses, and inrolled. The Court itself on one occasion, when its attention had been directed to the question, authorised the trustees of a charity to lend on mortgage(i).

[*542] *43. 33 & 34 Vict. c. 34. — Now by 33 & 34 Vict.

c. 34, corporations and trustees holding monies in trust for any *public or charitable purpose*, may invest them on any real security authorised by, or consistent with, the trust, and the requirements of the Mortmain Act are dispensed with. But upon foreclosure or release of the equity of redemption, the land is to be held upon trust to be converted into money, and to be sold accordingly.

[44. **Church trustees.**—By the Compulsory Church Rate Abolition Act, 1868, a body of trustees may be appointed in any parish for the purpose of accepting by bequest, donation, contract or otherwise, and of holding any contributions which may be given to them for ecclesiastical purposes in the parish. The trustees are to consist of the incumbent and two householders or owners or occupiers of land in the parish, one to be chosen by the patron and the other by the Bishop of the diocese; and the trustees so appointed are to be a body corporate with perpetual succession and a common seal (a).]

(g) *Re Christ's Hospital*, V. C. Wood, 12 W. R. 669.

(h) *Doe d. Graham v. Hawkins*, 2 Q. B. 212.

(i) *Attorney-General v. Gibson*,

Ex parte Lushington, Re Lady Prior's Charity, July 21, 1853, M. R. The mortgage was for 50,000*l.* upon an estate in Northamptonshire.

[(a) 31 & 32 Vict. c. 109, s. 9.]

45. *Lease to a trustee.* — Trustees of charities cannot grant *leases* to or in trust for *one of themselves*, for no trustee can be a tenant to himself, and the Court will charge him with an occupation rack-rent (*b*). Where two trustees were expressly authorised by the will to grant a lease to themselves, or either of them, with the consent of the tenant for life, and one of them took a lease with such consent accordingly, which was fair and proper, but it was found in effect that the relative characters of trustee and lessee were inconsistent, and led to inconveniences, the Court removed the trustee at the instance of the *cestuis que trust*, on the ground of the repugnant characters in this particular case of trustee and tenant; and though the trustee offered to surrender the lease, the Court, as it was beneficial to the *cestuis que trust*, held him to it, and dismissed him from the trust (*c*).

46. *Relations.* — Trustees should be cautious how they grant leases to their own *relations*, for that circumstance is calculated to excite a suspicion, which, if confirmed by any other fact, it might require a strong case to remove (*d*).

47. So a lease should not contain any covenant for the private advantage of the trustee; as where a corporation directed the insertion of a covenant that the lessee should grind at the corporation *mill, in a suit for [*543] the establishment of the charity the corporation were, for this instance of misbehaviour, disallowed their costs (*a*).

48. *Fines or rack-rent.* — Where trustees have a power given to them in general terms to grant leases, it is said that they may take *fin*es or reserve *rents* as, according to the circumstances of the case, may be most beneficial to the charity (*b*). If the trust estate held on lease increase in value upon the outlay of the *tenant*, the trustee is not called upon immediately to raise the tenant's rent, for such a practice would obviously prevent any improvement of the prop-

(*b*) Attorney-General v. Dixie, 13 Ves. 519, see 534; Attorney-General v. Earl of Clarendon, 17 Ves. 491, see 500.

(*c*) Passingham v. Sherborn, 9 Beav. 424.

(*d*) Ferraby v. Hobson, 2 Ph. 261,

per Lord Cottenham; and see *Ex parte Skinner*, 2 Mer. 457.

(*a*) Attorney-General v. Mayor of Stamford, 2 Sw. 592, 593.

(*b*) Attorney-General v. Mayor of Stamford, 2 Sw. 592. See now p.

546, *infra*.

erty (c). Nor if the value of the estate increase from the rise of agricultural produce will the trustee be personally liable, because he neglects for a few months to raise the rent; but if he wilfully continues the old rent when clearly a much higher rent can be obtained, he may be held responsible (d).

49. **Adequate consideration.**— In granting leases of charity lands care must be taken that the lease be for an adequate consideration, and if this be not observed, the Court will interfere and order the lease to be cancelled, and with the lease will also cancel the covenants (e).

50. **Leases at an under-value.**— The lease may be annulled on the mere ground of *under-value* (f); but it must be an under-value satisfactorily proved and considerable in amount; it is not enough to show that a little more might have been got for the estate than has been actually obtained; still less is it sufficient to infer the under-letting from the value of the property at some subsequent period (g).

51. **"Rent not to be raised."**— Even where it was ordained at the creation of the trust, that no lease should be made for above twenty-one years, and *the rent should not be raised*, it was held that the trustee would not be justified in granting leases from time to time at no more than the original reservation: that as the times alter and the price of provisions rises, the rent ought to be raised in proportion (h).

[*544] The * direction for leasing under the true value is no part of the charity, and in fact is *void in itself for perpetuity* (a).

(c) *Ferraby v. Hobson*, 2 Ph. 258, *per* Lord Cottenham.

(d) See *Ferraby v. Hobson*, 2 Ph. 255.

(e) *Attorney-General v. Morgan*, 2 Russ. 306.

(f) *East v. Ryal*, 2 P. W. 284; *Attorney-General v. Lord Gower*, 9 Mod. 224, *see* 229; *Attorney-General v. Magwood*, 18 Ves. 315; *Attorney-General v. Dixie*, 13 Ves. 519; *Poor of Yervel v. Sutton*, Duke, 43; *Eltham Parish v. Warreyn*, Duke, 67; *Wright v. Newport Pond School*,

Duke, 46; *Rowe v. Almsmen of Tavistock*, Duke, 42; *Crouch v. Citizens of Worcester*, Duke, 33; *Attorney-General v. Foord*, 6 Beav. 288.

(g) *Attorney-General v. Cross*, 3 Mer. 541, *per* Sir W. Grant.

(h) *Watson v. Hinsworth Hospital*, 2 Vern. 596; and *see* *Lydiatt v. Foach*, Id. 410; *Attorney-General v. Master of Catherine Hall, Cambridge*, Jac. 381; *Attorney-General v. St. John's Hospital*, 1 L. R. Ch. App. 92.

(a) *Hope v. Corporation of Gloucester*, 7 De G. M. & G. 647; *Attor-*

52. Under-value must be fraudulent to render the lease impeachable.— In considering the question of value it must be remembered that the case of a charity estate is one in which of all others, the *security* of the rent is the first point to be regarded, and therefore the inadequacy of the amount reserved is less a badge of fraud in this than it would be in almost any other instance (*b*). And Lord Eldon desired it might not be considered to be his opinion that a tenant who had got a lease of charity lands at too low a rate with reference to the actual value was therefore to be turned out, if it appeared he had himself acted fairly and honestly. The only ground for so dealing with him would be some *evidence* or *presumption* of collusion or corruption of motive (*c*).

53. Compensation for the under-value.— When leases are set aside for under-value and the Court awards a *compensation* to the charity for the loss which has been sustained by the charity through the collusion of the trustees and the tenant, the burden will fall upon the trustees or the tenant according to the circumstances of the case (*d*). For whatever length of time renewals of leases of *charity* lands upon payment of fines certain may have been granted, and though in pursuance of a scheme settled by the Courts, the tenants have gained no right, and cannot insist upon any further renewals (*e*). But if money has been laid out in improvements upon the faith of renewals, and the lessees have not been recouped their outlay by any subsequent enjoyment of the property, the Court, in the charity scheme, will have regard to their claims (*f*).

54. Unreasonable extent of the lease.— A lease of charity lands may also be invalidated on the ground of the *unreasonable extent of the term*. The duration of the lease should be such only as is consistent with the fair and provident man-

ney-General v. Greenhill, 33 Beav. 193.

(*b*) *Ex parte* Skinner, 2 Mer. 457, per Lord Eldon.

(*c*) *Ex parte* Skinner, 2 Mer. 457.

(*d*) See Duke, 116; Poor of Yervel v. Sutton, Id. 45; Attorney-Gen-

eral v. Mayor of Stamford, 2 Sw. 592, per Cur.; Attorney-General v. Dixie, 13 Ves. 540; Rowe v. Almsmen of Tavistock, Duke, 42.

(*e*) Attorney-General v. St. John's Hospital, 1 L. R. Ch. App. 92.

(*f*) S. C.

agement of the estate (*g*). It was therefore always a direct violation of duty to grant a lease for one thousand years (*h*), not only on the ground before noticed that such a demise would in effect be an absolute alienation, but also on [*545] the *principle that no private proprietor would choose to debar himself from profiting by the progressive improvement of the property. Sir Thomas Plumer observed, "The compensation which the trustees receive may be adequate at the date of the contract, but they are precluded for one thousand years from any advantage of *increased* value. It is true they are secured from *diminution*, and in some instances to guard against fluctuation may be as much the interest of one party as the other; but that would be an answer to all cases in which the trustees have made an alienation at a fixed rent. At the same time," continued his Honour, "it is just to say, that these principles seem not to have been acted upon at so early a period as 1670. In many cases in Duke's collection the Court acted on inadequacy of value, in none on mere extent of term" (*a*).

55. **Husbandry leases.** — *Husbandry* or *farm* leases should not be granted for a term certain exceeding *twenty-one years* (*b*). But neither is this rule to be taken as absolutely inflexible; but where the alienation is for any longer period, as for ninety-nine years, the Court will put it upon those who are dealing *for* and *with* the charity estate to show the reasonableness of such a transaction, for *primâ facie* it is unreasonable; there is no instance of a power in a marriage settlement to lease for ninety-nine years, except with refer-

(*g*) See Attorney-General v. Owen, 10 Ves. 560; Attorney-General v. Brooke, 18 Ves. 326; Attorney-General v. Griffith, 13 Ves. 575.

(*h*) Attorney-General v. Green, 6 Ves. 452; Attorney-General v. Cross, 3 Mer. 540; Attorney-General v. Dixie 13 Ves. 531; Attorney-General v. Brooke, 18 Ves. 326.

(*a*) Attorney-General v. Warren, 2 Sw. 304. But see Poor of Yervel v. Sutton, Duke, 43, resolution 2; Rowe

v. Almsmen of Tavistock, Id. 42; Wright v. Newport Pond School, Id. 46; Crouch v. Citizens of Worcester, Id. 33.

(*b*) See Attorney-General v. Owen, 10 Ves. 560; Attorney-General v. Backhouse, 17 Ves. 291; Rowe v. Almsmen of Tavistock, Duke, 42; Wright v. Newport Pond School, Id. 46; Poor of Yervel v. Sutton, Id. 43, resolution 2; Attorney-General v. Pargeter, 6 Beav. 150.

ence to very particular circumstances; the ordinary husbandry lease is for twenty-one years (c).

56. **Leases determinable on lives.** — In *Attorney-General v. Cross* (d), the trustees had been in the habit of granting leases for ninety-nine years, *determinable on lives*, in consideration of fines and the reservation of a small rent, a mode of letting very general in the county where the lands were situate, and which was proved to have been adopted by the founder himself. A bill was filed to set aside such a lease, but Sir W. Grant said, "I am not aware of any principle or authority on which it can be held that such a lease is on the very face of it a breach of trust. The legislature has, both in enabling and disabling statutes, * considered [*546] *leases for three lives as on a footing with leases for twenty-one years absolute*. So have the founders of charities, who prohibited the letting on lease for more than three lives, or twenty-one years." And his Honour dismissed the bill, and allowed the trustees their costs out of the charity estate.

57. **Leases for lives.** — In a later case, where charity lands had for two hundred years been let for lives upon a fine or foregift at a small reserved rent, Lord Langdale said there was no principle that a lease of a charitable estate for lives was, on the face of it, a breach of trust; and as there appeared no other ground of invalidating the leases, he refused to set them aside (a).

58. **Building leases.** — *Building* leases should be for a term not exceeding sixty, or ninety, or ninety-nine years (b). If granted for a longer period, it would be thrown upon the parties to show the reasonableness of the prolonged term from the particular circumstances of the case.

59. **Founder's intention.** — What has been said as to the proper duration of leases is of course only applicable where

(c) *Attorney-General v. Owen*, 10 Ves. 560, per Lord Eldon; and see *Attorney-General v. Griffith*, 13 Ves. 675; *Attorney-General v. Backhouse*, 17 Ves. 291; *Attorney-General v. Brooke*, 18 Ves. 326; *Attorney-General v. Lord Hotham*, T. & R. 216; *Attorney-General v. Kerr*, 2 Beav.

421; *Attorney-General v. Hall*, 16 Beav. 388.

(d) 3 Mer. 524; see pp. 530, 539.

(a) *Attorney-General v. Crook*, 1 Keen, 121, see 126.

(b) See *Attorney-General v. Owen*, 10 Ves. 560; *Attorney-General v. Backhouse*, 17 Ves. 291; *Attorney-General v. Foord*, 6 Beav. 290.

the founder himself has not otherwise given directions, for in general the will of the settlor, where explicit, must be strictly followed; as if the terms of the endowment be that the charity estates shall be *let only for twenty-one years*, the trustees, though satisfied that leases for ninety-nine years would be more beneficial, could not make such a deviation from the directions of the trust *without the sanction of the Court*. It was said on one occasion, with reference to such variations from the founder's intention, that the Court itself could not give a good title to the lessee, but that it required the authority of an Act of Parliament (c). It is plain, however, that there is a wide distinction between a deviation from the founder's intention as to the *objects* of the charity, and a deviation from the directions as to *management*, which were no doubt originally meant to be governed by circumstances.

60. **Improvements by leasees.**—When there has been no actual fraud, and the lessee or assignee of the lease is ejected after having laid out money in the permanent improvement of the property, the Court will direct an inquiry to what extent the charity estate has been benefited, and will allow the holder of the lease the amount of the benefit found (d).

[*547] *61. **Late Acts.**—By the Charitable Trusts Acts the Commissioners of Charities are empowered to authorise the grant by charity trustees of *building, repairing, improving, mining or other leases* (a), and the trustees are restricted from granting *without* the sanction of the Commissioners “any lease *in reversion* after more than *three years* of any existing term, or for any *term of life*, or in consideration wholly or in part of *any fine*, or for *any term of years exceeding twenty-one years*” (b).

[62. **Agricultural Holdings Act.**—The powers conferred by the Agricultural Holdings (England) Act, 1883, on a land-

(c) Attorney-General v. Mayor of Rochester, 2 Sim. 34.

(d) Attorney-General v. Day, V. C. Knight Bruce, March 9, 1847; and see Attorney-General v. Green, 6 Ves. 462; Attorney-General v. Kerr, 1 Beav. 420; Swan v. Swan, 8 Price,

518; Attorney-General v. Balliol College, 9 Mod. 411; Savage v. Taylor, Forr. 234; Shine v. Gough, 1 B. & B. 444.

(a) 16 & 17 Vict. c. 137, ss. 21, 26; 18 & 19 Vict. c. 124, s. 39.

(b) 18 & 19 Vict. c. 124, s. 29.

lord in respect of charging the land are not to be exercised by trustees for ecclesiastical or charitable purposes, except with the previous approval in writing of the Charity Commissioners (c).]

63. **Power of majority to pass legal estate.**—By 32 & 33 Vict. c. 110, s. 12, it is enacted that “where the trustees or persons acting in the administration of any *charity* have power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, *a majority of those trustees or persons who are present at a meeting of their body duly constituted*, and vote on the question, shall have and be deemed to have always had full power to execute and do all such assurances, acts, and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease, or disposition into effect; and all such assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being, and by the official trustee of charity lands” (d). The majority, therefore, in those cases of charity can bind the estate not only in equity but at law also, and that, whether the legal estate be vested in the trustees or other the persons aforesaid, or in the official trustee of charity lands.

64. **Charities may be incorporated.**—By “The Charitable Trustees Incorporation Act, 1872” (35 & 36 Vict. c. 24), it is enacted by s. 1, that from the date of the Act the trustees or trustee for the time being of any charity, may apply to the Charity Commissioners for a *certificate of registration*, and the Commissioners may grant such certificate subject to such conditions and directions as they may think fit as to the qualifications and number of the trustees, their tenure or avoidance of office, and the mode of appointing new trustees, and the custody *and use of [*548] the common seal, and thereupon the trustees shall become *a body corporate, by the name described in the certificate*, and may sue and be sued in their corporate name, and

[(c) 46 & 47 Vict. c. 61, s. 40.] enactment of 23 & 24 Vict. c. 136,
(d) And see the nearly similar s. 16, and *ante*, p. 540.

hold, acquire, convey, assign, and demise any present or future property of the charity as the trustees might have done before the incorporation. But the Act is not to extend, modify, or control the Act of 9th Geo. II. c. 36.

By section 2, the certificate of incorporation is to vest in the body corporate *all the real and personal estate* belonging to the charity, or held in trust for it; and persons in whose names any stocks, funds, or securities are standing in trust for the charity, are to transfer the same into the name of the body corporate; but, if such property be *copyhold*, liable to the payment of a fine or heriot on the death or alienation of the tenant, the lord of the manor shall receive a corresponding fine or heriot on the granting of the certificate, and a like fine or heriot at the expiration of every subsequent period of *forty years*. But the certificate is not to vest in the body corporate any stocks, funds, or securities held by the *official trustees* of charitable funds, which are not to be transferable except under an order of the Commissioners, and by ordinary transfer or assignment.

By the 4th section, the Commissioners are to see that *proper trustees* have been appointed before they grant the certificate, and after the grant the *trusteeship is to be duly kept up*, and a return of the names of the trustees is to be made at the expiration of every five years.

By the 5th section, the *trustees* of the charity, notwithstanding their incorporation, shall *continue chargeable* for such property as shall come to their hands, and be answerable for their own acts, receipts, neglects, and defaults, and for the due administration of the charity.

By the 10th section, *donations and dispositions* in favour of the charity by deed, will, or otherwise, shall take effect as if the same had been made to the charity by its corporate name.

By the 11th section, *contracts by the trustees* of a charity which would have been valid and binding if no incorporation had taken place, shall be valid and binding though not made under the seal of the body corporate.

65. **Exempted charities.**—It should be noticed that the *Universities* and the *Colleges* thereof, and various other

bodies of a charitable description, and charitable institutions wholly maintained by *voluntary contributions* (which expression is used in contradistinction to the term **endowments (a)*), are excepted from the operation [*549] of the *Charitable Trusts Acts (b)*.

66. **Roman Catholic Charities.**—Charities the funds of which are applicable exclusively for the benefit of *Roman Catholics* were originally exempted for a period of two years, which was afterwards repeatedly extended, and by the latest of these Acts was extended to July 1st, 1860 (c). Roman Catholic charities have therefore now fallen within the operation of the Charitable Trusts Acts.

(a) See *Governors for Relief of Widows, &c. of Clergymen v. Sutton*, 27 Beav. 651. (c) 19 & 20 Vict. c. 76; 20 & 21 Vict. c. 76; 21 & 22 Vict. c. 51; 22 & 23 Vict. c. 50; see 23 & 24 Vict.

(b) 16 & 17 Vict. c. 137, s. 62; 18 & 19 Vict. c. 124, s. 47. c. 134.

OF TRUSTEES UNDER THE SETTLED LAND ACTS.

UNDER the Settled Land Act, 1882, fundamental changes have been introduced in dealing with and disposing of Settled Estates, the powers which under the old law were usually given to the trustees of the settlement, and in some cases much more extensive powers, having been conferred on tenants for life and other limited owners. With a view, probably, to the protection of the remaindermen (though such protection has not been satisfactorily provided for), a class of trustees has been called into existence whose duties arise under the Act; but these duties are, with a few exceptions, to which attention will be drawn, principally of a ministerial nature, and do not involve the exercise of discretion. In the present chapter we propose to treat of the position and duties of these trustees; but incidentally to this it will be necessary to refer to the principal provisions of the Act, and to glance at the important changes which have been introduced by it.

1. **Trustees of the settlement.** — The trustees for the purposes of the Settled Land Act may either be nominated by the settlement itself, or appointed by the Court; and sect. 2 of the Act of 1882, provides that “the persons, if any, who are for the time being, under a settlement (*a*), trustees with power of sale of settled land, or with power of consent to or

[(*a*) The term “settlement” includes any instrument, or any number of instruments, whether made before or after, or partly before and partly after the commencement of the Act, under which land, or any estate or interest in land, stands limited to or in trust for persons in succession; see sect. 2, sub-s. (1). It has, however, been held by Pearson, J., that where there is an original settlement

complete in itself, and derivative settlements have afterwards been made by persons who take interests which have not yet fallen into possession under the original settlement, the original settlement alone is the settlement for the purposes of the Act, *Re Knowles’ Settled Estates*, 27 Ch. D. 707; but this view seems hardly consistent with the language of the Act.

approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees * thereof for the purposes of [*551] the Act, are for the purposes of the Act trustees of the settlement." From this definition it appears that in the case of settlements created before the Act, trustees with a power of sale, or a power of consenting to or approving of a sale, if there are any such trustees, and they only, are "trustees of the settlement" within the meaning of the Act. But trustees to whom personal estate has been bequeathed upon trust to convert it and invest the proceeds in the purchase of real estate to be settled strictly, are not trustees of the settlement for the purposes of the Act (a).

Executors with charge of debts. — Executors or trustees who, under a charge of debts, have an over-riding power to sell settled land, seem to be trustees for the purposes of the Act.

In instruments since the Act it is usual and proper to appoint expressly trustees of the settlement for the purposes of the Act.

2. Appointment by the Court. — Where there are no trustees of the settlement within the definition, or where in any other case it is expedient for the purposes of the Act that new trustees of the settlement should be appointed, the Court may, if it thinks fit, on the application of the tenant for life, or of any other person having under the settlement an estate or interest in the settled land, in possession, remainder or otherwise, or in the case of an infant of his testamentary or other guardian or next friend, appoint fit persons to be trustees under the settlement for the purposes of the Act (b).

The exercise of this power is in the discretion of the Court, and it has been laid down in a case in Ireland, that, upon an application under this section to appoint trustees, the Court should not only require to be satisfied of the fitness of the proposed trustees, but also that the purpose for which their appointment is asked is such as to render

(a) *Burke v. Gore*, 13 L. R. Ir. 367.

(b) Sect. 38, sub-sect. (1).

their appointment safe and beneficial to all parties interested. And where the application was with a view to having a large fund taken out of Court and invested upon mortgage of lands in Ireland, it was refused (c).

3. **On summons.** — The application to the Court should be by summons, which should be served on the trustees (if any), and also on the tenant for life, if he is not the applicant, but not on any other person unless the Judge so directs (d).

The persons appointed by the Court, and the survivors and survivor of them, while continuing to be trustees or trustee, and until the appointment of new trustees [*552] the personal representatives or * representative for the time being of the last surviving or continuing trustee, are for the purposes of the Act the trustees or trustee of the settlement (a).

Solicitor of tenant for life not appointed trustee. — As the appointment of trustees is required to impose a check upon the extensive powers conferred upon the tenant for life, and sect. 44 contemplates the probability of there being differences between the trustees and the tenant for life, the Court will not appoint any member of the firm of solicitors who act for the tenant for life (b), and *a fortiori* will not appoint the actual tenant for life, or any person who may become tenant for life, to be a trustee of the settlement (c).

Infant's share in unconverted realty. — The share of an infant under the Statute of Distributions in realty which has been improperly allowed to remain unconverted, is settled land within the meaning of the Act, so as to enable the Court, under sect. 38, to appoint trustees to exercise the powers of the Act; but the order appointing the trustees will be made without prejudice to any question as to the interests of the infants (d).

(c) *Burke v. Gore*, 13 L. R. Ir. 367.

(d) Rules of the Supreme Court under the Settled Land Act, 1882, R. R. 2, 4 and 6.

(a) Sect. 38, sub-sect. (2).

(b) *Re Kemp's Settled Estates*, 24

Ch. D. 485; *Re J. Walker's Trusts*, 48 L. T. N. S. 632; 31 W. R. 716.

(c) *Re Harrop's Trusts*, 24 Ch. D. 717.

(d) *Re Wells*, 48 L. T. N. S. 859; 31 W. R. 764; but see *Re Greenville Estate*, 11 L. R. Ir. 138.

Tenant for life a lunatic. — Where a tenant for life is a lunatic, and his committee applies, under sect. 62 of the Act, for an order enabling him to exercise the powers of the Act, and no trustees are in existence, new trustees must be appointed for the purposes of the Act, and be served with notice of the application (*e*).

4. By sect. 39, sub-sect. (1), capital money arising under the Act is not to be paid to fewer than two persons as trustees of a settlement, unless the settlement authorises the receipt of capital trust money of the settlement by one trustee. But subject thereto, by sub-sect. (2), the provisions of the Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Where personal estate is settled so that the trustees have authority to vary the investments, and after-acquired property is settled, by reference, upon the same trusts, the trustees, having an implied power of sale, fall within the definition of trustees of the settlement for the purposes of the Act (*f*), and if in such a case power is given by the settlement to the trustees *or trustee* to act and give receipts for moneys subject to the trusts of the settlement, *the case falls within the exception of sect. 39, [*553] sub-sect. (1), and a single trustee may receive the purchase-money of the real estate arising from a sale by the tenant for life (*a*).

5. **Tenant for life.** — We will next advert to the position of the tenant for life, and the powers given by the Act to the tenant for life, under which term we shall include not only the person or persons beneficially entitled to the possession of the settled land, or the receipt of the income thereof for his life (*b*), but also the limited owners, who, under sect. 58, have the powers of a tenant for life under the Act.

Defined. — We may here remark that by sect. 2, the tenant for life is defined to be “the person for the time being

(*e*) *Re Taylor*, 52 L. J. N. S. Ch. 728; 31 W. R. 596; 49 L. T. N. S. 420.

(*f*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

(*a*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

(*b*) See sect. 2, sub-ss. (5) and (10) (i).

under a settlement beneficially entitled to possession of settled land for his life" (c); and "if there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act"; and a person who is "tenant for life within the foregoing definition is to be deemed such, notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent"; and, by sub-sect. (10), possession includes receipt of income.

6. **Persons having powers of tenant for life.** — By sect. 58, sub-sect. (1), the powers of a tenant for life are given to each of the following persons, when his estate or interest is in possession, namely —

(1). A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services.

(2). A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event.

(3). A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown.

(4). A tenant for years determinable on life, not holding merely under a lease at a rent.

[*554] *(5). A tenant for the life of another, not holding merely under a lease at a rent.

(6). A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate,

(c) By sect. 8 of the Settled Land Act, 1884, the estate of a tenant by the curtesy is, for the purposes of the Act of 1882, to be deemed an estate arising under a settlement made by his wife.

or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose.

(7). A tenant in tail after possibility of issue extinct.

(8). A tenant by the curtesy.

(9). A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

Under this section it has been held that, where estates were devised to the use of trustees upon trust to pay the net income to the testator's wife, for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees or to the son for the same, and upon the son's attaining twenty-one, then upon trust for him absolutely, but if he should die under twenty-one without leaving issue, then upon other trusts, the infant son had the powers of a tenant for life, as being tenant in fee simple, with an executory limitation over in the event of his death under twenty-one without issue (a). So where, subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A., with remainders over, and the trustees were to enter into possession, and during the life of A. manage the property and pay all expenses and outgoings, and keep down the interest on charges, and pay an annuity, and then pay the ultimate residue of the rents and profits to A., and the income was insufficient after payment of the outgoings and interest to pay the annuity, it was held that A. came within sub-sect. (1), clause (9), of sect. 58, and had the powers of a tenant for life (b). So where estates were limited to trustees for a term of 1300 years, and subject thereto to A. for life, with remainders over in strict settlement, and the trusts of the term were to raise portions, to pay annuities, including an annuity to A., and to apply the

(a) *Re Morgan*, 24 Ch. D. 114.

(b) *Re Jones*, 24 Ch. D. 583; 26 Ch. D. 736.

residue as a sinking fund to pay off mortgage debts and other charges, and the trustees were, "during the [*555] *continuance of the trusts," to enter into and hold possession of the rents and profits of the estate, and "not deliver the same to any person beneficially interested in any part thereof," and manage the estate as therein mentioned, and full powers of management were given to the trustees, and they were also given such other powers over the estate as were given to a tenant for life in possession by the Settled Land Act, 1882, it was held that A. was a tenant for life, or a person having the powers of a tenant for life, within the meaning of the Act, and that the trustees could not sell or enfranchise without his consent, as required by sect. 56 of the Act (a).

A gift of an estate comprised in a lease for years to a person during the remainder of the term, if he shall so long live, is not within either clause (4) or clause (6) of subsect. (1), and the devisee cannot exercise the powers of a tenant for life under the Act (b).

7. **Powers of tenant for life.**—Speaking in general terms, the Settled Land Act has not only given to the tenant for life all the powers of disposition of the settled land which were previously given in well-drawn settlements to the tenant for life, or to the trustees with the consent of the tenant for life, but has also conferred on the tenant for life larger and more extended powers, and has effected a complete revolution in the manner of dealing with settled estates, and in the mutual relations of the tenant for life and trustees. Thus the Act has given to the tenant for life an absolute power at his own discretion to sell, enfranchise and exchange the settled land, to grant building, mining and other leases thereof, to concur in a partition, to accept surrenders of lease, to dedicate parts of the settled land for streets and open spaces, and other similar purposes, and various other powers, the details of which, and the conditions and restric-

(a) *Re Duke of Buccleugh's* (Clitheroe) Estate, *Re Clitheroe Estate*, 28 Ch. D. 378. (b) *Re Hazle's Settled Estates*, 26 Ch. D. 428; affirmed 29 Ch. D. 78.

tions upon and subject to which they are exercisable, do not fall within the purview of the present work.

8. **Cannot be assigned or released.**—These powers of the tenant for life are not capable of assignment or release, and do not pass to a person as being by operation of law or otherwise an assignee of a tenant for life, and remain exercisable by a tenant for life after and notwithstanding any assignment of his estate or interest; and a contract by the tenant for life not to exercise any of the powers is void. But the exercise of the powers will be without prejudice to the rights of the assignee for value of the tenant for life's estate or interest; and the assignee's rights are not to be affected without his consent, except *that un- [*556] less the assignee is in actual possession of the settled land or part thereof, his consent is not to be requisite for the making of leases by the tenant for life at the best rent, without fine, and in other respects in conformity with the Act (a).

Provisions prohibiting exercise of powers void.—By sect. 51, any provision in a settlement tending or intended to prohibit or prevent the tenant for life from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under the Act, is made void; and by sect. 52, notwithstanding anything in a settlement, the exercise by the tenant for life of any power under the Act shall not occasion a forfeiture.

9. **Powers of the Act cumulative.**—By sect. 56, the powers conferred by the Act are not to effect prejudicially any powers subsisting under the settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees, and the powers given by the Act are cumulative, by which is understood that the powers of the settlement, and those under the Act, are co-existent, and that it is optional with the tenant for life to exercise the powers conferred by the Act, or, his consent to the exercise by the trustees of their

(a) Sect. 50. In this section "assignment" includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, and "assignee" has a corresponding meaning.

powers being rendered necessary to sub-sect. (2), to allow the powers under the settlement to be exercised (b).

10. *Powers of tenant for life absolute.*—But in exercising them he is in position of a trustee.—One of the objects of the Act doubtless was to give the tenant for life, in his uncontrolled discretion, large and absolute powers of dealing with and disposing of the settled land, without requiring him to procure the consent of any person interested in remainder, or making him responsible to any one for the exercise of his discretion; subject only to this, that by sect. 53 the tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement, and is, in relation to the exercise thereof by him, to be deemed in the position, and to have the duties and liabilities, of *a trustee* for those parties.

In one case, Pearson, J., even said, “there is nothing in the Act to enable the Court to restrain the tenant for life from selling, whether he desires to sell because he is in debt and wishes to increase his income, or whether, without being in debt, he thinks he can increase his income, or [*557] whether he desires to sell from mere *unwillingness to take the trouble involved in the management of landed property; or whether he acts from worse motives, as from mere caprice or whim, or because he is desirous of doing that which he knows would be very disagreeable to those who expect to succeed him at his death. There is not, so far as I can see, any power, either in the Court or in trustees, to interfere with his power of sale” (a). But this seems to go too far, and not to give due effect to the provisions of sect. 53, under which the tenant for life is, in relation to the exercise of the powers of the Act, made a trustee for all parties interested, and must, it is conceived, in the exercise of his discretion, be subject to the same rules

(b) As to the effect of the restriction in sub-sect. (2), on the powers of trustees, see chap. XXIII. s. 2, v.; and see *Re Duke of Newcastle's Estates*, 24 Ch. D. 129; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Re Barrs-*

Haden's Settled Estates, W. N. 1883, p. 188.

(a) *Wheelwright v. Walker*, 23 Ch. D. 752; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; and see *Thomas v. Williams*, 24 Ch. D. 558.

as any other trustee; and be liable to the interference of the Court if the exercise of the discretion is affected by improper motives (b).

And in a subsequent phase of the same case, the remainderman having offered to purchase the estate for 7,500*l.*, and undertaken at the bar not to withdraw his offer, an injunction was granted by Kay, J., to restrain the tenant for life from selling for less than 7,500*l.*, and from entering into any contract (otherwise than by public auction), for sale of the estate, or any part thereof, without first communicating the offer to the remainderman, and giving him two clear days to make an advance on the price offered (c).

Effect of decree in action to execute trusts. — It is conceived, that the fact that a decree has been made in a pending action for the execution of the trusts of a will or settlement of realty, will not prevent a tenant for life thereunder from exercising the powers of the Act without procuring the consent of the Court. To require such consent would be to impose a fetter on the free alienation by the tenant for life inconsistent with the spirit and terms of the Act.¹

11. Notice to trustees. — By sect. 45, sub-sect. (1), the tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, is to give notice of his intention to each of the trustees of the settlement, and also to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by registered letter, posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same; and by sub-sect. (2), at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

General notice sufficient. — Under this section it * was held that a general notice of intention to sell [*558] or lease all or any part of the settled estate at any

(b) See *post*, p. 616; and see *Re Mansel's Settled Estates*, W. N. 1884, p. 209. (c) *Wheelwright v. Walker*, 48 L. T. N. S. 867; 31 W. R. 912.

¹ So now decided, *Cardigan v. Curzon-Howe*, 33 W. R. 836; 30 Ch. D. 531.

time or times as opportunity should occur, was insufficient (*a*); but by sect. 5 of the Settled Land Act, 1884 (*b*), it is now provided, by sub-sect. (1), that the notice required by sect. 45 of the Act of 1882 of intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf; but by sub-sect. (2), the tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected or in progress, or immediately intended; and the section applies, by sub-sect. (4), to a notice given before, as well as to a notice given after, the passing of the Act; provided, by sub-sect. (5), that no objection to such notice was taken before the passing of the Act.

Except as to a mortgage or charge.—It is to be observed that the Act of 1884 does not extend to the case of notice of intention to make a mortgage or charge; and such a notice, to be valid, must specify the particular mortgage or charge contemplated at the time when the notice is given (*c*).

Committee of lunatic.—The committee of a lunatic tenant for life cannot give a legal notice under the Act, unless he has previously obtained the sanction of the Court of Lunacy thereto (*d*).

Waiver of notice.—Any trustee, by writing under his hand, may waive notice, either in any particular case or generally, and may accept less than one month's notice (*e*). And it is conceived that the waiver of notice, or acceptance of shorter notice, if signed by all the trustees, will extend as well to the notice to be given to the trustees' solicitor under the Act of 1882, as to the notice to be given to the trustees themselves.

12. Where notice to sole trustee sufficient.—Where trustees are appointed by a settlement with such powers as to make

(*a*) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(*b*) 47 & 48 Vict. c. 18.

(*c*) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(*d*) *Re Ray's Settled Estates*, *ubi supra*.

(*e*) 47 & 48 Vict. c. 18, s. 5 (3).

them, under sect. 2, of the Act of 1882, trustees of the settlement for the purposes of the Act, and the powers are made by the settlement exercisable by the trustees or *trustee* for the time being, it will be sufficient to give notice under sect. 45, to a sole surviving or continuing trustee: and the number of trustees need not, for the purposes of the notice, be completed (*f*)

13. **Purchaser need not inquire as to notice.**— By sect. 45, sub-sect. (3), a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving *of any notice required by that section. As, [*559] however, under the Act of 1882 at least a month's notice to the trustees was imperative, any person dealing with the tenant for life was bound to see that there had been, for at least that period, before any dealing took place, proper trustees to whom notice could have been given; but now, under the Act of 1884, it will be sufficient if the trustees, although more recently appointed, by writing under their hands, either waive notice altogether or accept shorter notice, and it would seem to follow that the purchaser is not now in any case bound to do more than ascertain that there were trustees in existence at the time the contract was entered into.

Notice by registered letter.— If a shorter notice is accepted, it may still be sent by registered letter, as provided by the Act of 1882.

It is conceived that it is not essential to the validity of the notice that it should be sent by a registered letter, but that that is only a convenient mode authorised by the Act of serving the notice.

14. **Duties of trustees on receipt of notice.**— We come now to consider what are the duties of trustees of the settlement under the Act after they have received a notice of an intended dealing by the tenant for life, and it is somewhat remarkable that, having regard to the importance attached by the Act to the service on the trustees of notice of any intended dealing by the tenant for life with the settled land,

(*f*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

the Act should be silent as to what the trustees on their part ought to do in the interest of the remaindermen when they receive a notice. No doubt if it comes to their knowledge that the tenant for life is contemplating or attempting to commit a fraud—as, for instance, by selling or leasing the property at a gross undervalue under some secret arrangement by which he is to derive a personal benefit, it would be their duty to come to the Court and ask for an injunction to restrain the sale or lease (*a*). But if the dealing is not on the face of it fraudulent or improper, there is no obligation on the trustees to inquire into or take any steps in the matter; and in any case they are, by sect. 42, expressly protected from any liability for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing as they might make, bring, take or do.

On the whole, it seems that the protection afforded to the remaindermen against an improper exercise by the tenant for life of his powers by the appointment of trustees of the settlement, coupled with notice to them under sect. 45, is of a very shadowy nature, and in the majority of cases is of no practical value.

[*560] * 15. **Where consent of trustees necessary to exercise of powers.**—There are however some powers which the tenant for life can only put in force either with the consent of the trustees or under an order of the Court, and as to these the trustees before giving their consent must exercise their discretion on behalf of all persons interested.

Sale of mansion house.—Timber.—Thus under sect. 15, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, cannot be sold or leased by the tenant for life without such consent or order (*a*), and under sect. 35, a tenant for

(*a*) See *Wheelwright v. Walker*, 23 Ch. D. 762, 762.

(*a*) The Court will sanction a sale even though the testator has expressly directed that the mansion house is to be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms shall at

all times be kept in the mansion house, if a proper case for sale is made out, but the sale will not be sanctioned without proper directions being given for the disposal of the heirlooms. They may, however, be sold under sect. 37, if the tenant for life so desires and the Court approves. *Re Brown's Will*, 27 Ch. D. 179.

life impeachable for waste in respect of timber, can on obtaining such consent or order, cut and sell timber ripe and fit for cutting.

Improvements.—So again sect. 25 enumerates the various improvements which fall under the description of improvements authorised by the act (*b*), * but by [*561] sect. 26, sub-sect. (1), where the tenant for life is

(*b*) These improvements are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes, namely:

(1.) Drainage, including the straightening, widening, or deepening of drains, streams, and water-courses.

(2.) Irrigation, warping.

(3.) Drains, pipes, and machinery for supply and distribution of sewage as manure.

(4.) Embanking or weiring from a river or lake, or from the sea or a tidal water.

(5.) Groynes, sea walls, defences against water.

(6.) Inclosing, straightening of fences, re-division of fields.

(7.) Reclamation, dry warping.

(8.) Farm roads, private roads, roads or streets in villages or towns.

(9.) Clearing, trenching, planting.

(10.) Cottages for laborers, farm-servants, and artisans, employed on the settled land or not.

(11.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes.

(12.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled

land for agricultural purposes, or as woodland or otherwise.

(13.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption.

(14.) Tramways, railways, canals, docks.

(15.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes.

(16.) Markets and market-places.

(17.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land.

(18.) Sewers, drains, water-courses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid.

(19.) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines.

desirous that capital money arising under the Act, shall be applied in or towards payment for an improvement authorised by the Act (*a*), he may submit for approval to the trustees of the settlement, or to the Court as the case may require, a scheme for the execution of the improvement showing the proposed expenditure thereon: and by subsect. (2), where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on —

(A). A certificate of the land commissioners certifying that the work or operation, or some specified part thereof has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate is to be conclusive in favour of the trustees, as an authority and discharge for any payment made by them in pursuance thereof; or on

(B). A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(C). An order of the Court directing or authorising the trustees to so apply a specified portion of the capital money.

16. **Capital money under the Act.** — We may here observe that under the term “capital money arising under the Act,” are comprised, (1). Monies received upon any sale or enfranchisement, or for equality of exchange or partition; (2). Fines received on the grant of leases under any power conferred by the Act of 1882 (*b*); (3). The proportion of rent under mining leases to be set aside under sect. 11 of the Act of 1882; (4). Money raised on mortgage of the settled

(20.) Reconstruction, enlargement, or improvement of any of those works.

(a) This section is not retrospective and does not apply to improvements effected before the passing of the Act. *Re Knatchbull's Settled*

Estate, 27 Ch. D. 349; affirmed 29 Ch. Div. 588.

(b) The Settled Land Act, 1882, omitted to provide that these fines should be capital money under the Act, but the omission has been supplied by The Settled Land Act, 1884, s. 4.

land, under sect. 18 of the Act; (5). Three-fourths of the net proceeds of the sale of timber cut under the powers of sect. 35, where the tenant for life *is [*562] impeachable for waste in respect of timber; and (6).

Money arising from the sale of heirlooms under sect. 37 of the Act.

Money arising from other sources.—By sect. 32, where under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of the Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorised by the Act under which the money is in Court, that money may be invested or applied as capital money arising under the Settled Land Act. And by sect. 33, where, under a settlement, money is in the hands of trustees (a), and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as trustees have independently of the Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under the Act.

17. Application of capital money.—By sect. 21, capital money arising under the Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorised object for which the same was raised, is to be invested or applied in one or more of the following modes:

(1). In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law (b) authorised to invest trust money of the settlement, or on the security of the bonds, mortgages,

(a) It has been held in Ireland that this section does not apply to money in Court in an administration action, which has arisen from personal estate given to trustees upon trust to convert and to invest the pro-

ceeds in the purchase of lands to be settled; *Burke v. Gore*, 13 L. R. Ir. 367.

(b) As to investments authorised by law see *ante*, Chap. xiv. s. 4.

or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for the ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

(2). In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land (c), or [*563] other the whole estate *the subject of the settlement (a), or of land-tax, rent-charge in lieu of tithe, Crown-rent, chief rent, or quit-rent, charged on or payable out of the settled land.

(3). In payment for any improvement authorised by the Act (b).

(4). In payment for equality of exchange or partition of settled land.

(5). In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land.

(6). In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life.

(7). In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers rela-

(c) The words "incumbrances affecting the inheritance of the settled land" must be taken in their ordinary sense of mortgages, portions, &c., and not as meaning incumbrances such as charges for land drainage and improvements created under the Land Improvement Act, 1864, and other similar Acts, which, although in one sense affecting the inheritance, are in numerous cases charges rather affecting the tenant for life than the remainderman, *per* Pearson, J.; *Re Knatchbull's Settled Estate*, 27 Ch. D. 349; affirmed 29 Ch. Div. 588.

Therefore, where before the passing of the Settled Land Act charges of this nature have been created, the tenant for life is not entitled to have them discharged out of the capital of the settled land, *Id.*

(a) It is not necessary that the incumbrance should affect the whole of the settled estates, it is sufficient if it affect any land the subject of the settlement; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651.

(b) For the authorised improvements, see *ante*, p. 560, note (b).

tive to the working of mines or minerals therein or in other land.

(8). In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes.

(9). In payment to any person becoming absolutely entitled or empowered to give an absolute discharge.

(10). In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Act.

(11). In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Improvements under Agricultural Holdings Act. — And under the Agricultural Holdings (England) Act, 1883 (*c*), capital money arising under the Settled Land Act, 1882, may be applied in payment of any monies expended and costs incurred by a landlord under the former Act in the execution of any improvement mentioned in the first or second parts of the schedule thereto (*d*), as * for an improve- [*564] ment authorised by the Settled Land Act; and such

(*c*) 46 & 47 Vict. c. 61, s. 29.

(*d*) The first part of the schedule relates to improvements to which the landlord's consent is required, and comprises:

(1.) Erection or enlargement of buildings.

(2.) Formation of silos. As to the Court authorizing the formation of silos, see *Re Broadwater Estate*, 33 W. R. 738.

(3.) Laying down of permanent pasture.

(4.) Making and planting of osier beds.

(5.) Making of water meadows or works of irrigation.

(6.) Making of gardens.

(7.) Making or improving of roads or bridges.

(8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.

(9.) Making of fences.

(10.) Planting of hops.

(11.) Planting of orchards or fruit bushes.

(12.) Reclaiming of waste land.

(13.) Warping of land.

(14.) Embankment and sluices against floods.

The second part of the schedule relates to drainage an improvement in respect of which notice to the landlord is required.

money may also be applied in discharge of any charge created on a holding under the Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorised by the Settled Land Act to be discharged out of such capital money.

18. **Subject to direction of tenant for life.**—By sect. 22, sub-sect. (1), capital money arising under the Act is to be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and is to be invested or applied by the trustees, or under the direction of the Court, as the case may be accordingly.

Sub-sect. (2). The investment or other application by the trustees is to be made according to the direction of the tenant for life, and in default thereof, according to the direction of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of the trust money of the settlement; and any investment is to be in the names or under the control of the trustees.

Sub-sect. (3). The investment or other application under the direction of the Court is to be made on the application of the tenant for life, or of the trustees.

Sub-sect. (4). Any investment or other application is not during the life of the tenant for life to be altered without his consent.

Sub-sect. (5). Capital money arising under the Act, and the securities arising from the investment thereof, are for all purposes of disposition, transmission, and devolution, to be considered as land, and to be held and go accordingly.

Sub-sect. (6). The income of the securities is to be paid or applied as the income of the land, if not disposed of, would have been payable or applicable under the settlement.

Sub-sect. (7). The securities may be converted into money, which is to be capital money arising under the Act

[*565] * It will be observed that the tenant for life may *direct* in what manner, consistently with the Act, the capital money is to be invested or applied, and the duty of the trustees in carrying out such directions is purely ministerial, and, except where the consent or approval of the trus-

tees is expressly required as for an outlay on improvements, does not involve the exercise of any discretion.

19. Where settled real estate has been sold under the Lands Clauses Consolidation Acts, and the purchase-money paid into Court, the Court will appoint trustees of the settlement for the purposes of the Settled Land Act, and order the fund in Court to be paid out to them to be held upon the trusts of the settlement (a).

20. **Purchases confined to England.**—By sect. 23, capital money arising under the Act from settled land in England is not to be applied in the purchase of land out of England, unless the settlement expressly authorises the same.

21. **Form of conveyance.**—By sect. 24, land acquired by purchase or in exchange, or on partition, is to be made subject to the settlement, as follows: Freehold land is to be conveyed to the uses, on the trusts, and subject to the powers and provisions subsisting with respect to the settled land, but not so as to increase or multiply charges or powers of charging. Copyhold, customary, or leasehold land is to be conveyed to and vested in the trustees of the settlement on trusts, and subject to powers and provisions corresponding with the uses, trusts, powers, and provisions of the freehold land, but so that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under twenty-one.

22. **Application of money arising from limited interests.**—By sect. 34, where capital money arising under the Act is purchase-money paid in respect of a lease for years, or life, or for years determinable on life, or in respect of any other estate or interest in land less than a fee simple, or in respect of a reversion, the trustees of the settlement or the Court, as the case may be, may require the same to be laid out, invested, accumulated, and paid in such manner as in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom, as they might lawfully have had from the

(a) *Re Harrop's Trusts*, 24 Ch. D. 662; *Re Duke of Rutland's Settlement*, 717; *Re Wright's Trusts*, 24 Ch. D. 140, W. N., 1883, p. 140.

lease, estate, interest, or reversion, in respect whereof the money was paid, or as near thereto as may be.

Under this section it will be the duty of the trustee to take care upon a sale by the tenant for life of a lease-[*566] hold interest, or a * reversion, that the proceeds of the sale are so dealt with as not to affect the relative interests of the tenant for life and remainderman (*a*). This section corresponds with the 74th section of the Lands Clauses Consolidation Act, 1845, and its construction will be regulated by the decisions under that Act (*b*). Thus, if the property is subject to a lease at a rent less than the income produced by the investment of the purchase-money the tenant for life will be entitled during the remainder of the term, for which the property was let, to a sum equal only to the rent, and the residue of the income should be accumulated at compound interest until the end of the term, after which the tenant for life will be entitled to the whole of the income including the income of the accumulations (*c*).

So, on the other hand, if the property sold was a lease for a short term, the tenant for life is entitled to receive an annuity of such an amount as will exhaust the proceeds of sale in the number of years which the lease had to run (*d*).

23. **Heirlooms.**—By sect. 37, sub-sect. (1), where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born, or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them; and by sub-sect. (2), the money arising by the sale is to be capital money arising under the Act, and to be paid, invested, or applied, and otherwise dealt with in like manner in all respects as by the Act directed with respect to other capital money arising under the Act, or may be invested in the purchase of other chattels, of the same or

(*a*) See *Re Griffith's Will*, 49 L. T. N. S. 161. Eq. 72; *Re Wilkes' Estate*, 16 Ch. D. 597; *Cottrell v. Cottrell*, 33 W. R. 301;

(*b*) *Cottrell v. Cottrell*, 28 Ch. D. 628. 28 Ch. D. 628.

(*c*) *Re Wootton's Estate*, 1 L. R. 589; *Re Mette's Estate*, 7 L. R. D. 27.

(*d*) *Askew v. Woodhead*, 14 Ch. D. 27.

any other nature, which are to be settled and held on the same trusts, and to devolve in the same manner as the chattels sold; but by sub-sect. (3), no sale or purchase of chattels under this section is to be made without an order of the Court.

Whether proceeds of heirlooms devolve as personalty.—A dignity or title of honour which descends to the heirs general or heirs of the body, is within the definition of land, and heirlooms settled so as to devolve with the dignity or title may be sold under this section.¹ We have already referred to the sections regulating the application or disposition of capital money arising under the Act (*e*), and it is to be observed that under sect. 22, sub-sect (5), capital money is “for all purposes of disposition, transmission, and devolution, to be considered as *land*,” and is to be held for, and go to, the same persons successively, in the same manner, and for and on the same * estates, interests, and [*567] trusts, as the *land* wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.” It has been doubted whether this sub-section has any application to money arising from the sale of personal chattels; and there seems no sound reason for making the money arising from the chattels devolved as land, while if it is re-invested in other chattels they are to devolve as personalty. The latter part of the sub-section points to money arising from *land* as being the subject matter to which it relates and it would be construing the sub-section in direct opposition to the spirit in which it is framed to hold, that, while its apparent object was to leave the estates and interests of the persons beneficially interested in land unaffected by the sale, when applied, by reference, to money arising from personal chattels it is to have the effect of altering the nature of the estates, and in most cases of changing an absolute estate in remainder into a mere tenancy in tail. To effectuate such a change the language of the Act should be clear and unambiguous, and it is conceived that the language

(*e*) See *ante*, p. 562.

¹ *Re Carnac's Will*, 33 W. R. 837; W. N. 1885, p. 142.

of sub-sect. (5) does not meet that test, and that the devolution of the moneys arising from personal chattels will remain unaffected by the sale.¹

24. Receipts.—By sect. 40, the receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to them or him is made a good discharge, and, in the case of a mortgagee or other person advancing money, exonerates him from being concerned to see that the money advanced is wanted for any purpose of the Act, or that no more than is wanted is raised.

In construing this section, sect. 39 must be borne in mind, which expressly prohibits the payment of capital money to fewer than two persons as trustees of a settlement, unless the settlement otherwise provides; and, taking the two sections together, it seems to follow, that, in the absence of any special direction in the settlement, a sole personal representative of the last surviving or continuing trustee cannot give a good discharge for capital money under the Act.

25. Indemnity and reimbursement.—Sects. 41 & 43 supply the usual indemnity and reimbursement clauses for the trustees of the settlement.

26. Protection of trustees.—By sect. 42, the trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing [*568] any such application, action, proceeding, or thing, *as they might make, bring, take, or do; and in case of purchase of land with capital money arising under the Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land

¹ See *Re Duke of Marlborough's Settlement*, 1886, W. N. 1885, p. 136.

in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

Under this section the trustees are under no liability if they stand by and take no active part while the tenant for life is exercising his powers, but it is conceived that the indemnity given by this section to the trustees only holds good so long as they have not actual notice that the tenant for life is acting fraudulently or even improperly. At any rate, trustees, who with the knowledge that the tenant for life is committing a fraud upon his powers take no active steps for the protection of the remaindermen, relying on this section, would be acting most imprudently, and would have little reason to complain if they were made personally liable for any loss arising from their negligence.

Trustees must see that conveyance is in the proper form. —

It will be observed that trustees in order to have the benefit of this section where land is brought into the settlement upon a purchase, exchange, partition, or lease, must see that the conveyance purports to convey the land in the proper mode, but they are not bound to do more than take care that the deed on the face of it is properly drawn, and is duly executed by the conveying parties, and that the person to whom the purchase-money is paid by the direction of the tenant for life properly joins in the conveyance.

27. Differences between tenant for life and trustees. — By sect. 44, if at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of the Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

28. By sect. 55, the powers conferred by the Act are exercisable from time to time, and in exercising the powers the

[*569] tenant for life * and trustees may respectively execute, make, and do, all necessary and proper deeds, instruments, and things.

29. **Additional powers.** — By sect. 57, sub-sect. (1), nothing in the Act is to preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by the Act; but by sub-sect. (2), any such additional or larger powers are to operate and be exercisable in the like manner and with all the like incidents, effects, and consequences, as if they were conferred by the Act, unless a contrary intention is expressed in the settlement.

30. **Tenant for life an infant.** — By sect. 60, where a tenant for life, or a person having the powers of a tenant for life under the Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life, the powers under the Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. Under this section the Court in Ireland refused, where an infant was entitled to an undivided share of land, to appoint one of his co-owners to exercise on his behalf the powers of the Act, but required the appointment of an independent person (a). The Court in directing the mode of sale under this section can order it to be made out of Court (b).

31. **Tenant for life a married woman.** — By sect. 61, sub-sect. (1), the foregoing provisions of the Act do not apply in the case of a married woman; but by sub-sect. (2), a married woman entitled for her separate use, or entitled under any statute for her separate property or as a *feme sole*, is, without her husband, to have the powers of the Act; and by sub-sect. (3), where she is entitled otherwise than as aforesaid, she and her husband together are to have the powers. By sub-sect. (4), the provisions of the Act referring to a tenant

(a) *Re Greenville Estate*, 11 L. R. Ir. 138. (b) *Re Price*, 27 Ch. D. 552.

for life extend to a married woman entitled to property as her separate estate or as a *feme sole*, and this brings the case of an infant married woman so entitled within sect. 60, and her powers can during infancy be exercised by the trustees of the settlement. But if the married woman is an infant married to a man of full age, and the property does not belong to her as her separate property or as a *feme sole*, a question arises whether the powers of the Act can be exercised during her infancy. For in that case, by sub-sect. (4) of sect. 61, the provisions of the Act referring to a tenant for life extend to *the married woman and her [*570] husband together, and as she and her husband together have the powers of a tenant for life, the case does not seem to fall within sect. 60, which applies only where the person having the powers is an infant. The case put appears to be a *casus omissus* from the Act.

32. *Trust or direction for sale.*—Where the settlement contains a trust or direction for the sale of the property, the rights and powers of the trustees and tenant for life stand upon a different footing, and are governed by the independent enactment contained in the 63d section (a). The construction of this section is somewhat obscure, and the extent to which the powers of trustees were affected by it was a question of grave difficulty; but by the Settled Land Act, 1884, the powers given by the 63d section of the Act of 1882 to tenants for life or other persons having limited interests are not to be exercised without the leave of the Court, which leave is to be given by order naming the persons to exercise the powers, and until such an order is made and registered as a *lis pendens*, it seems clear that the trustees may execute all trusts and powers reposed in them by the settlement as if the Settled Land Acts had not been passed, while after an order has been made and registered and so long as it remains in force the powers of the trustees are suspended, so far as relates to any purpose for which leave is given by the order to exercise a power conferred by the Act of 1882. Under

(a) As to this section and the extent to which the powers given by the settlement to trustees are affected by it and the Settled Land Act, 1884, see Chap. xxiii. s. 2, v.

these circumstances no conflict can now arise, under sect. 63, between the trustees and the tenant for life as to the exercise of their powers, and it seems unnecessary to consider what is the proper construction of the section in this respect.

33. Where the powers of the Act are exercisable and any necessity arises for trustees of the settlement for the purposes of the Act, they are by sect. 63 defined to be "the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of the Act."

34. By sub-sect. (2) of sect. 63, the provisions of the Act referring to a tenant for life, and to a settlement, and to settled land, are to extend to cases under that section with certain exceptions, of which the following are the material ones for the present purpose.

[*571] * (a). Capital money is not to be applied in the purchase of land unless expressly authorised by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorised by the Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(b). Capital money and the securities in which the same is invested shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests and trusts, as the same would have gone, and been held, if arising under the settlement from a sale or disposition of the settled land, and the income of such capi-

tal money and securities shall be paid or applied accordingly.

(c). Land of whatever tenure acquired under the Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

35. **Commission for sale.**— Where settled property had been put up for sale by auction by the tenant for life under the Act, but withdrawn for want of a sufficient offer, and was afterwards sold by private contract on the same day, it was held that the trustees were at liberty to pay out of the purchase-moneys one commission for conducting the sale, including the conditions of sale, and also commission for deducing the title and perusing and completing the conveyance according to the scale of charges contained in Schedule 1, Part I. to the general order under the Solicitors' Remuneration Act, 1881; and also the costs occasioned by the concurrence in the sale of the tenant for life's mortgagees, and a proper sum to the auctioneer for his charges (a).]

(a) *Re Beck*, 24 Ch. D. 608.]

THE POWERS OF TRUSTEES.

THE powers of trustees are either *General* or *Special*; the former, such as by construction of law are incident to the office of trustee *virtute officii*; the latter, such as are conferred *vi terminorum*, i.e., by the settlor himself by an express proviso in the instrument creating the trust.

SECTION I.

OF THE GENERAL POWERS OF TRUSTEES.¹

1. **Powers of trustees at law distinguished from their powers in equity.**—In a Court of *law* the trustee, as the absolute proprietor, may of course exercise all such powers as the legal ownership confers; but in *equity* the *cestui que trust* is the absolute owner, and the question we have to consider in this place is, how far the trustee may deal with the estate

¹ *General powers of trustees.*—Powers must be executed, according to the settlor's intention as indicated by the declaration of trust; *Kerr v. Verner*, 66 Pa. St. 326; *Guion v. Pickett*, 42 Miss. 77. At law the trustee has largely the powers of an absolute owner; *Slevin v. Brown*, 32 Mo. 176; *Harrison v. Rowan*, 4 Wash. C. C. 202; but in equity the *cestui que trust* is regarded as the owner, and the trustee must perform certain duties for him, neither omitting from nor adding thereto, and if particular directions are given they must be exactly carried out, without any discretion; *Wormley v. Wormley*, 8 Wheat. 421; *Beatty v. Clark*, 20 Cal. 11. Trustees may receive instructions and directions from the court, if there is any doubt about the course they should pursue; *Petition of Baptist Church*, 51 N. H. 424; *Woodruff v. Cook*, 47 Barb. 304; *Loring v. Steineman*, 1 Met. 207; *Crosby v. Mason*, 32 Conn. 482; *Tillinghast v. Coggeshall*, 7 R. I. 383.

A trustee may make repairs, but he must indulge in no unnecessary expense; *Sohier v. Eldredge*, 103 Mass. 345; *Herbert v. Herbert*, 57 How. Pr. 333; *Williams v. Smith*, 10 R. I. 280; trust estate may become subject to a mechanic's lien; *Cheatham v. Rowland*, 92 N. C. 340.

Power to mortgage.—Mortgage should not be executed in individual capacity; *Gilbert v. Gilbert*, 39 Ia. 657; trustee may not mortgage to secure his own debt; *Merriman v. Russell*, 39 Tex. 278; may mortgage unless forbidden by the trust instrument; *Dibrell v. Carlisle*, 51 Miss. 785; *Miller v. Redwine*,

without rendering himself responsible in the *forum* of a Court of equity.

2. General rule as to powers of trustees in simple trusts. —

With respect to the *simple* trust, as the trustee is a mere

75 Ga. 130; especially for the support of the trustee; *Hamilton v. Insurance Co.* 3 Tenn. Ch. 124; court cannot direct trustee to mortgage trust property; *U. S. Trust Co. v. Roche*, 41 Hun, 549; mortgage to pay debts allowed; *Pike v. Baldwin*, 68 Ia. 263.

Discretionary powers. — They will not be interfered with by the courts, unless they are abused; *Cromie v. Bull*, 81 Ky. 646; *Ames v. Scudder*, 11 Mo. App. 168; or controlled, except good faith is absent; *Bacon v. Bacon*, 55 Vt. 243; a trustee may be given unlimited discretion to change the nature of the trust property; *Christian v. Worsham*, 78 Va. 100. Equity may not have jurisdiction of a discretionary power; *Young v. Young*, 97 N. C. 132. If a trustee is allowed to exercise his best judgment, his powers are very broad; *Veazie v. Forsaith*, 76 Me. 172; *Heard v. Sill*, 26 Ga. 302.

Compromise by trustee. — A compromise, if for good and sufficient cause, will be sustained; *Pool v. Dial*, 10 S. C. 440; *Clarke v. Cordis*, 4 Allen, 466; *Mayer v. Foulkrod*, 4 Wash. 349; it must be such a compromise as a court would sanction; *Bacot v. Heyward*, 5 S. C. 441; a trustee cannot discharge liens to the prejudice of the cestui que trust; *Perkins v. Dyer*, 6 Ga. 401; may submit to arbitration; *Clark v. Cordis*, 4 Allen, 466.

Various powers. — A trustee may not give trust property as security for money borrowed for his own use; *Brewster v. Galloway*, 4 Lea, Tenn. 558. Power to "sell and dispose" is broad enough to cover a mortgage; *Waterman v. Baldwin*, 68 Ia. 255. Power to trustee to rent and pay rents does not include any further interest in lands; *Hicks v. Bullock*, 96 N. C. 164. Trustee selling for nominal consideration is in violation of trust, and there is only a gift deed, the donee becoming a trustee for the original cestui que trust; *Everett v. Railway*, 67 Tex. 430. The trust, by limitations in the declaration, cannot be bound for certain debts; *Pracht v. Lange*, 81 Va. 712. A trustee may, upon citation and hearing, get power to purchase so that the transaction will be binding; *Scholle v. Scholle*, 101 N. Y. 167; *Carson v. Marshall*, 37 N. J. Eq. 213; a trustee may purchase at a judicial sale, not controlled by himself, if he acts in good faith; *Lusk's App.* 108 Pa. St. 152; *Baker v. Springfield, &c., R. R. Co.* 86 Mo. 75. A trustee holding for one, with remainder to his children, cannot under power to sell, bind the children by an agreement to lease; *Bergengren v. Aldrich*, 139 Mass. 259. A trustee has power to defend the trust estate; *Geissler v. Werner*, 3 Dema. 200; if the trustee becomes insane he can do nothing; *Bailey v. Hill*, 77 Va. 492; where, in deed of trust, a conveyance at request of cestui que trust might be made, a conveyance by trustee after death of cestui que trust was void; *Bradstreet v. Kinsella*, 76 Mo. 63. One holding mortgaged land as trust cannot buy at or after foreclosure sale and acquire an interest hostile to the cestui que trust; *Toole v. McKiernan*, 48 N. Y. Sup'r Ct. 163. A trustee cannot apply the trust fund to a debt claimed by him to be due him from the cestui que trust, especially if it is disputed; *Terry v. Bale*, 1 Dema. 452. A power to sell and exchange does not allow the trustee to raise any charge upon the estate; *Hewitt v. Phelps*, 105 U. S. 393. In reference to the Statute of Limitations, see *Smith v. Drake*, 23 N. J. Eq. 302; *Hubbell v. Medbury*, 53 N. Y. 98; *Carr v. Houser*, 46 Ga. 477; *Patten v. Pearson*, 60 Me. 220.

passive depositary, he can in equity neither take any part of the profits, nor exercise any dominion or control over the *corpus*, except at the instance of the *cestui que trust*.

3. *In special trusts.* — In the *special* trust the authority of the trustee is, as a *general* rule, equally limited except so far as the execution of the trust itself may invest him with a proprietary power, and the duties thus prescribed to him the trustee is bound strictly to pursue without swerving to the right hand or to the left.

4. *Exceptions.* — But, *under particular circumstances*, the trustee is held capable of exercising the discretionary powers of the *bond fide* proprietor; for the trust estate itself might otherwise be injuriously affected. The necessity of the moment may demand immediate action, while the sanction

of the parties who are beneficially interested could [*573] * not be procured without great inconvenience (as

where the *cestuis que trust* are a numerous class), or perhaps could not be obtained at all (as where the *cestuis que trust* are under disability, or not yet in existence). The alternative of consulting the Court would always be attended with considerable expense, and, it may be, an expense wholly disproportioned to the importance of the occasion, and perhaps in the meantime the opportunity might be lost. It is therefore evidently in furtherance of the *cestuis que trust's* own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power (a). But a trustee for adults should not take any proceeding without consulting his *cestuis que trust*; and if he do, and the proceeding is disavowed by them, he may have to pay the costs (b).

5. *Notice of trustee's intention to cestui que trust.* — Where the trust is not definite and precise, and it is doubtful what ought to be done under the trust, it is said that the trustee may *give notice to the cestui que trust of his intention* to do a particular act, and that unless the *cestui que trust* interferes

(a) See *Angell v. Dawson*, 3 Y. & De G. M. & G. 827; *Ward v. Ward*, C. 317; *Darke v. Williamson*, 25 2 H. L. Cas. 784.
Beav. 622; *Harrison v. Randall*, 9 (b) *Bradby v. Whitchurch*, W. N. Hare, 407; *Forshaw v. Higginson*, 8 1868, p. 81.

to stop it, the Court might well hold the trustee not to be liable for doing the act (c).

6. **Validity of an act without suit.** — It is a rule of equity, that what is compellable by suit, or would have been ordered by the Court, is equally valid if done by the trustee *without suit*, i.e., without the sanction of the Court (d). The difficulty with which the trustee has to struggle is the danger of assuming that the Court, on application to it, would view the matter in the same light with which he regards it himself (e).

7. **Matter of form may be dispensed with.** — Trustees, to avoid circuitry, may dispense with *forms*, the observance of which would only lead to expense. If, for instance, the transfer of a sum of stock be secured to trustees of a settlement, and they have power by the settlement to sell out the fund and invest on mortgage, they need not insist on a transfer of the stock *in specie* for the purpose of immediately selling out and *investing the proceeds on [*574] mortgage, but if they have the mortgage ready may take the value of the stock and hand it over to the mortgagor (a). So trustees having a power to lay out a certain sum in the purchase of an annuity for A. B., may pay the sum to A. B. direct, without going through the form of purchasing the annuity (b).

8. **Repairs.** — Where the legal estate is vested in trustees in trust for one person *for life*, with remainders over to others, it would be natural to suppose that the rights in equity as between the tenant for life and the remaindermen would be the same as those at law between a legal tenant for life and

(c) *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 74, *per* L. J. Turner.

(d) *Lee v. Brown*, 4 Ves. 369, *per* Cur.; *Earl of Bath v. Bradford*, 2 Ves. 590, *per* Lord Hardwicke; *Cook v. Parsons*, Pr. Ch. 185, *per* Cur.; *Inwood v. Twyne*, 2 Eden, 153, *per* Lord Northington; *Hutcheson v. Hammond*, 3 B. C. C. 145, *per* Buller, J.; *Terry v. Terry*, Gilb. 11, *per* Lord Cowper; *Shaw v. Borrer*, 1 Keen, 576, *per* Lord Langdale; *Seagram v.*

Knight, 2 L. R. Ch. App. 630; *Gilliland v. Crawford*, 4 I. R. Eq. 42, *per* Cur. [*Brown v. Smith*, 10 Ch. D. 377.] The same rule holds also at law, see Co. Lit. 171, a.

(e) See *Forshaw v. Higginson*, 3 Jur. N. S. 476.

(a) See *Pell v. De Winton*, 2 De G. & J. 20; *George v. George*, 35 Beav. 382.

(b) *Messeena v. Carr*, 9 L. R. Eq. 280.

legal remaindermen. It is, however, now clearly settled, that whatever may be the *legal* liability of a *legal* tenant for life in respect of *permissive waste* (*c*), the trustee cannot (where there is no special clause of management) interfere with the possession of an equitable tenant for life who neglects to repair (*d*).

9. **Legal rights. — Equitable rights.** — In other respects the rights in equity must, it is conceived, be governed by those at law. Thus a legal tenant for life may cut timber for the purpose of repairs (*e*), though he may not cut timber to sell it and apply the produce (*f*), or to repay himself the outlay in repairs (*g*); and similarly the trustee may, it is conceived, as against the remainderman, cut timber for necessary repairs, if the tenant for life will consent to an application of income towards repairs in making use of the timber. The repairs by a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligation, and he cannot claim any charge for them upon the inheritance (*h*).

Repairs and improvements. — Nor [before the Settled Land Act, 1882, would] the Court at his instance direct [*575] *lasting *improvements* to be made (*a*); and though it was said by the Court in one case that the rule might not be absolutely without exception, as if there were a settled estate, and a fund directed to be laid out in the purchase to the same uses, it might be more beneficial to the

(*c*) *Powys v. Blagrave*, 4 De G. M. and G. 458, and cases there cited by Lord Cranworth; *Harnett v. Maitland*, 16 M. & W. 257. Now by 36 & 37 Vict. c. 66, where there is any conflict between the rules of Equity and the rules of Common Law, the rules of Equity are to prevail.

(*d*) *Powys v. Blagrave*, Kay, 495; 4 De G. M. & G. 448; and see *Re Skingley*, 3 Mac. and G. 221; *Gregg v. Coates*, 23 Beav. 33.

(*e*) Co. Lit. 54 b.

(*f*) Co. Lit. 53 b. [But now by the Settled Land Act 1882, s. 35, a tenant for life, whether legal or equitable, may, with the consent of the trustees of the settlement, or an order

of the Court, cut and sell timber ripe and fit for cutting, but three-fourths of the net proceeds are to be retained in settlement.]

(*g*) *Gower v. Eyre*, G. Coop. 156; and see *Duke of Marlborough v. St. John*, 5 De G. & Sm. 181.

(*h*) *Hibbert v. Cooke*, 1 S. & S. 552; *Caldecott v. Brown*, 2 Hare, 144; and see *Bostock v. Blakeney*, 2 B. C. C. 653; *Hamer v. Tilsley*, Johns. 486; *Dent v. Dent*, 30 Beav. 363; *Floyer v. Bankes*, 8 L. R. Eq. 115; *Gilliland v. Crawford*, 4 I. R. Eq. 35; *Re Leigh's Estate*, 6 L. R. Ch. App. 887.

(*a*) *Nairn v. Majoribanks*, 3 Russ. 582.

remainderman that part of the trust fund should be applied to prevent buildings on the settled estates from going to destruction, than that the whole should be laid out in the purchase of other lands (*b*), yet an extraordinary case was requisite to create such exception (*c*). [But where trustees having monies in their hands directed to be invested in lands to be strictly settled, entered into an agreement for purchase of an estate, but the farm buildings, and cottages on the property were out of repair, the Court sanctioned the application of 1000*l.* out of the monies in their hands in repairing, improving and rebuilding the farm buildings and cottages (*d*).

10. **Under Settled Land Act.**—Now by the Settled Land Act, 1882, sect. 26, the tenant for life may, with the approval of the trustees of the settlement, or the approval of the Court as the case may require, according as the money to be expended is in the hands of the trustees or in Court, expend any capital money arising under the Act in any of the improvements specified in sect. 25, of the Act (*e*).

And as under sect. 59, an infant entitled in possession to land is for the purposes of the Act to be deemed tenant for life thereof, and by sect. 60, the powers of an infant tenant for life may be exercised on his behalf by the trustees of the settlement, or if there are none by the nominees of the Court, all proper improvements may be effected "under the Act, notwithstanding the infancy of the beneficial owner.

11. **Generally.**—Independently of the powers of the Settled Land Act] a trustee holding an estate for the benefit of a person absolutely entitled, but incapable from infancy or otherwise to give directions, may make necessary *repairs*, but he must not go beyond the necessity of the case, as by *ornamental improvements*, or the expense will not be allowed (*f*). The trustees of a will were to permit the testa-

(*b*) *Caldecott v. Brown*, 2 Hare, 145, *per* Sir J. Wigram; and see *Re Barrington's Estates*, 1 J. & H. 142.

(*c*) *Dunne v. Dunne*, 3 Sm. & G. 22; *Dent v. Dent*, 30 Beav. 363.

[(*d*) *Lord Cowley v. Wellealey*, 46 L. J. N. S. Ch. 869.]

[(*e*) As to payment out of capital money for improvements under the Agricultural Holdings (England) Act, 1883, see s. 29 of the Act, and *ante*, p. 563.]

(*f*) *Bridge v. Brown*, 2 Y. & C. C. 181; and see Attorney-General v.

tor's son to have "the use and enjoyment" of a house, and were "empowered" during the son's "occupation," [*576] to make "repairs" * and Lord Romilly, M. R., held that the trustees were to keep the house in a *habitable* state, but not to make *ornamental* repairs (*a*). Where a mansion house was dilapidated at the date of the testator's will, and he empowered his trustees "to keep all the buildings in good *repair*, and to make such improvements by draining, walling, *building*, liming, or manuring, as they should think proper," the trustees had no power to *rebuild* the mansion house (*b*). But under a power to "improve the estate by erecting farm-houses and out-buildings, or by draining and planting," it was held that the trustees could erect agricultural cottages (*c*). And where the trustees of a term of 1000 years were specially authorised to keep the premises in good repair and "*generally to superintend the management*" of the estate, the Court held that the latter words conferred a general power without limit, that is, according to the discretion of the trustees, and allowed the sums expended by them in erecting and repairing farm-houses and buildings, in draining, fencing, sinking wells, putting up pumps, constructing a bridge, and forming, repairing, and altering roads (*d*). If trustees, without any special power to authorise it, lay out money in improving the estate (as in building a villa upon ground intended to be building ground, and which object they are advised will be promoted by the erection of the villa), they cannot justify the expenditure, but on the other hand, the *cestuis que trust* cannot take the benefit and repudiate the whole outlay, but the trustees will be liable only for the loss to the estate (*e*). [And where the mansion house had been burnt down and the trustee applied a large sum, in addition to the insurance monies, in restoring the mansion house, the Court was of opinion that it had no jurisdiction to order a sale or mort-

Geary, 3 Mer. 513; Gilliland v. Crawford, 4 I. R. Eq. 35.

(a) Maclaren v. Stainton, M. R. March 14, 1866, MS.

(b) Bleazard v. Whalley, 2 Eq. Rep. 1093; see *ante*, p. 537.

(c) Lord Rivers v. Fox, 2 Eq. Rep. 776.

(d) Bowes v. Earl of Strathmore, 8 Jur. 92.

(e) Vyse v. Foster, 8 L. R. Ch. App. 309, affirmed 7 L. R. H. L. 318.

gage of the settled estates to raise the amount of the outlay, or to authorise the expenditure, for the restoration, of monies which were subject to a trust for re-investment in land; but it appearing that the estate had been benefited to the full amount of certain funds in Court, which had arisen from the sale of part of the settled estates, Kay, J., sanctioned the application of those funds towards recouping the trustee, on the ground that the trustee having *bond fide* expended money for building on the estate, under a reasonable expectation that the Court would sanction the expenditure, and having improved the estate to *the full amount [*577] of the funds in Court, might be recouped the amount so expended (a).] If the trust be to make repairs out of the *rents*, and the trustees borrow money to make the repairs, and then repay themselves out of the rents, they will not be allowed the interest on the money borrowed, for the trust was to apply the rents after they had accrued (b).

[12. **Allowances to tenant for life.**—Where trustees of a term are authorised to make improvements on the trust property, and to raise the sums required by mortgaging the hereditaments comprised in the term, or out of the rents, issues, and profits, and subject to the term the property is strictly settled, the tenant for life is entitled to have the amount of income applied by the trustees in permanent improvements raised out of the corpus of the estates (c).

Where there was no power to manage or cultivate the real estate, and a farm was in hand, and no tenant could be found, the Court allowed 1,000*l.* part of the personalty which was held on the same trusts as the realty, to be advanced to the tenant for life, who was one of the trustees, on his bond, he undertaking to expend it in stocking, taking, and cultivating the farm to the satisfaction of his co-trustee (d).]

13. **Land Improvement Act.**—By the Improvement of Land Act, 1864 (e), trustees in the *actual possession or receipt of*

[(a) *Jesse v. Lloyd*, 48 L. T. N. S. 656.]

(b) *Fazakerley v. Culshaw*, 19 W. R. 793.

[(c) *Re Marquess of Bute*, 27 Ch. D. 196.]

[(d) *Re Household*, 27 Ch. D. 553.]

(e) 27 & 28 Vict. c. 114. Extended by 33 & 34 Vict. c. 56, to building and improvement of mansions; [and by 40 & 41 Vict. c. 31, to the construction and erection of reservoirs and

the rents or profits of lands are enabled, by the 24th section, to apply for and make, in conformity with the provisions of the Act, the several improvements mentioned in the 9th section, such as drainage, reclamation of land, erection of farm buildings, planting, &c.

14. **Cutting timber.**—Where an estate was devised to A. and his heirs upon trust to settle on B. for life, subject to impeachment of waste, remainder to C. for life, without impeachment of waste, remainder to C.'s first and other sons in tail, and before any settlement was executed the trustee, with the concurrence of B. and C., cut down timber which showed symptoms of decay, Sir L. Shadwell said "he considered the timber to have been cut by the authority of [*578] the trustee, who * had a superintending control over the estate; that it was not a wrongful act; and that the effect of it must be the same as if it had been done with the sanction of the Court" (a). And in a later case (b) the Court seemed to think that a tenant for life, impeachable for waste, would not be chargeable with interest during his own life as to such timber felled by him as the Court would have ordered to be cut, but that the *onus* would be on the tenant for life to make out that such was the case.

[15. **Settled Land Act.**—Now by the Settled Land Act, 1882, sect. 35, a tenant for life impeachable for waste may, with the consent of the trustees of the settlement or an order of the Court, cut and sell timber ripe and fit for cutting, but three-fourth parts of the net proceeds of the sale are to be set aside as capital money arising under the Act.

16. **Management of land and receipt and application of income during minority.**—In the case of instruments com-

other works of a permanent character for the supply of water; and by the Settled Land Act, 1882, s. 30, to all improvements authorised by that Act, see sect. 25. In *Re Dunn's Settled Estate*, W. N. 1877, p. 39, it was held that the sum to be charged under 33 & 34 Vict. c. 56, was not confined to two years' rental of the particular estate on which the mansion was to

be built, but extended to two years' rental of all the estates comprised in the settlement.]

(a) *Waldo v. Waldo*, 7 Sim. 261; and see *Gent v. Harrison*, Johns. 517; *Earl Cowley v. Wellesley*, 1 L. R. Eq. 656.

(b) *Bagot v. Bagot*, 2 New Rep. 297.

ing into operation after the 31st December, 1881, under which an infant, not being a married woman, is beneficially entitled to the possession or receipt of the rents and profits of land or hereditaments corporeal or incorporeal, large powers of management during the minority of the infant have, unless a contrary intention is expressed in the instrument, been provided by the Conveyancing and Law of Property Act, 1881. Sect. 42 of that Act enacts that:—

(1). If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2). The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to * drain or [*579] otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3). The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4). The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5). The trustee shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i). If the infant attains the age of twenty-one years, then in trust for the infant;

(ii). If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii). If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has
[*580] taken the land from which the accumulated fund *is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determin-

able, then in trust for the infant's personal representatives, as part of the infant's personal estate; but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6). Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.]

17. Trustees are authorised to oppose a bill in Parliament prejudicial to *cestuis que trust*.—Conservators of public works and similar *quasi trustees* are authorised to apply the funds under their control in *opposing* a bill in Parliament, the effect of which if passed would be injurious to the interests confided to them. "Every trustee," said Lord Cottenham, "is entitled to be allowed the reasonable and proper expenses incurred in protecting the property committed to his care. But if they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect, but probable" (a).

18. Applications to Parliament.—On the other hand, *quasi* trustees, such as those before referred to, are not entitled to apply the funds of an existing undertaking in or towards the expense of obtaining *other or larger* Parliamentary powers (b).

19. As to insurance.—A *trustee* would, it is conceived, under special circumstances, and in due course of management, be justified in *insuring* the property (c); but where there is a tenant for life, he could not be advised to do so out of the income without the tenant for life's consent.

(a) *Bright v. North*, 2 Ph. 220; *Queen v. Norfolk Commissioners of Sewers*, 15 Q. B. 549; *Attorney-General v. Andrews*, 2 Mac. & G. 225; *Attorney-General v. Eastlake*, 11 Hare, 205; [*Attorney-General v. Mayor of Brecon*, 10 Ch. D. 204; *Regina v. White*, 14 Q. B. D. 358, reversing S. C. 11 Q. B. D. 309.]

2 Mac. & G. 225; *Vance v. East Lancashire Railway Company*, 3 K. & J. 50; *Attorney-General v. Guardians of the Poor of Southampton*, 17 Sim. 6; *Attorney-General v. Corporation of Norwich*, 16 Sim. 225; *Stevens v. South Devon Railway Company*, 13 Beav. 48.

(c) *Ex parte Andrews*, 2 Rose, 412;

(b) *Attorney-General v. Andrews*, and see *Fry v. Fry*, 27 Beav. 146.

But if an annuity and a policy on the life of the *cestui que vie* be made the subject of a settlement, it is implied that the trustee is to pay the premiums out of the income (*d*). A mortgagee is not regarded as a trustee; and if, in the absence of any stipulation on the subject, he effects an insurance, it is on his own account, and he cannot claim to be entitled to the premiums under just allowances. It is the same [*581] as if a lessor or lessee insured, in * which case the other would have no claim to the benefit of the policy (*a*).

[20. Direction by testator to carry on trade.— In a recent case in Ireland (*b*), it has been held that a general bequest in the will of a trader to trustees upon trust to permit his wife to carry on his business so long as she should remain a widow was equivalent to a direction to the trustees to carry it on themselves with the property employed by the testator himself in the trade, and that the assets to the extent of such property were liable to pay for goods supplied to the testator's widow for the trade carried on by her; and where a will contained a direction that the testator's business was to be carried on for a specified time, without any actual disposition of his property beyond a direction for the payment by the executors of certain legacies, the executors were held to be entitled, so long as the business was carried on for the purposes of the will, to the free use and occupation of the business premises and the fixed plant and machinery without paying any rent for the same (*c*). Where a testator gave all his real and personal estate to trustees upon trust for sale and conversion, and empowered them to carry on his business and employ therein all the capital invested therein at his death, and to increase or abridge the business and his capital therein, an equitable mortgage by the trustees of the

(*d*) *Darcy v. Croft*, 9 Ir. Ch. Rep. 19.

(*a*) *Dobson v. Land*, 8 Hare, 216; and see *Ex parte Andrews*, 2 Rose, 410; *Phillips v. Eastwood*, Ll. & G. t. Sugden, 289. [But see 23 & 24 Vict. c. 145, s. 11; since repealed and its

place supplied by 44 & 45 Vict. c. 41, s. 19, sub-sect. (1), (ii).]

[(*b*) *Gallagher v. Ferris*, 7 L. R. Ir. 489; and see *Re Johnson*, 15 Ch. D. 548; *Strickland v. Symons*, 26 Ch. D. 245; *Boylan v. Fay*, 8 L. R. Ir. 374.]

[(*c*) *Re Cameron*, 26 Ch. D. 19.]

testator's real estate to raise monies which were applied for the purposes of the business was held to be within their powers.^{1]}

21. **Breaking up the testator's establishment.** — An *executor* is allowed a reasonable time for breaking up the testator's establishment, and a period of two months in one case was considered not to be excessive (*d*). Executors, as a general rule, do not pay legacies until the expiration of one year from the testator's death; but this is a rule of convenience; and, therefore, if the assets be clearly sufficient for payment of debts and legacies, there is nothing to prevent the executors from discharging the legacies before the expiration of the year (*e*).

22. **Appropriation.** — An executor may *appropriate* a legacy without the necessity of a suit, where the appropriation is such as the Court itself would have directed (*f*).

23. **Maintenance.** — A trustee may expend sums of money for the *protection and safety*, or *support*, of a *cestui que trust* who is incapable of taking care of himself, but the more prudent course is to apply to the Court (*g*).

* 24. **Out of interest.** — If a *legacy* be left to an [*582] infant, and the Court, upon application, would, from the inability of the parent to support his child, order *maintenance* out of the *interest*, the trustee, should he make advances for that purpose without suit, would be allowed them in his account (*a*). In the case of *Andrews v. Partington* (*b*), Lord Thurlow refused to indemnify the trustee; but the authority of that decision has been repeatedly denied, and may be considered as overruled (*c*). And the maintenance

(*d*) *Field v. Peckett* (No. 3), 29 Beav. 576.

(*e*) *Angerstein v. Martin*, 1 T. & R. 241, *per* Lord Eldon; *Pearson v. Pearson*, 1 Sch. & Lef. 12, *per* Lord Redesdale; and see *Garthshore v. Chalie*, 10 Ves. 13.

(*f*) *Hutcheson v. Hammond*, 3 B. C. C. 128, see 145, 148; and see *Cooper v. Douglas*, 2 B. C. C. 231.

(*g*) *Duncombe v. Nelson*, 9 Beav. 211; and see *Chester v. Rolfe*, 4 De G. M. & G. 798, and cases there cited.

(*a*) *Sisson v. Shaw*, 9 Ves. 285; *Prince v. Hine*, 26 Beav. 634.

(*b*) 3 B. C. C. 60.

(*c*) See *Sisson v. Shaw*, 9 Ves. 288; *Maberly v. Turton*, 14 Ves. 499; *Lee v. Brown*, 4 Ves. 369; *Ex parte Darlington*, 1 B. & B. 241; *Cotham v. West*, 1 Beav. 381.

¹ *Re Dimmock*, 52 L. T. N. S. 494.

of each year need not be confined to the interest of that year, but the trustee will be allowed in his accounts to set off the gross amount of the maintenance against the gross amount of the interest (*d*).

[Recent Act. — Now by the 43d sect. of the Conveyancing and Law of Property Act, 1881, trustees under instruments coming into operation either before or after the commencement of the Act, holding property for an infant, either for life or for any greater interest, and whether absolutely, or contingently on his attaining twenty-one, or on the occurrence of any event before his attaining that age, are expressly authorised to apply the income of that property, or any part thereof, for or towards the maintenance, education, or benefit of the infant, or to pay it to the infant's parent or guardian for that purpose, and this whether there be any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not; and the trustees are to accumulate the residue of the income in the way of compound interest for the benefit of the person who ultimately becomes entitled to the property from which the accumulations arise, with power at any time to apply such accumulations as income of the current year (*e*).

Under this section the trustees have a discretionary power to apply past accumulations of income in payment of past maintenance (*f*).

25. This section applies only if and so far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and is to have effect subject to the terms of the instrument, but a direction to trustees to accumulate the income of the shares of children who are entitled contingently on their attaining twenty-one, [*583] or being daughters attaining that age or * marrying, and to pay the same to them as and when their presumptive shares become payable is not the expression of such a contrary intention (*a*).

(*d*) *Carmichael v. Wilson*, 3 Moll. 79; *Edwards v. Grove*, 2 De G. F. & J. 210. [(*f*) *Re Pitts' Settlement*, W. N. 1884, p. 225.]
 [(*a*) *Re Thatcher's Trusts*, 26 Ch. D. 420.]
 (*e*) 44 & 45 Vict. c. 41, s. 43.]

26. **Income of gift absolute in form but liable to be defeated.** — The corresponding section in Lord Cranworth's Act, the wording of which was very similar, was held not to apply to the case of a gift absolute in the first instance but liable to be defeated in the event of the legatee not attaining twenty-one. In such a case the accumulations of income were held to belong to the infant's estate notwithstanding his death under age (*b*). It may be doubted whether that case was not intended to be covered by the enactment, but it does not fall within the strict letter of it, and no distinction can be drawn in this respect between the language of the corresponding sections in Lord Cranworth's Act and the recent Act.

27. **Income of contingent gift.** — Where the infant was entitled contingently on his attaining twenty-one, or on some event before his attaining that age, to a legacy carrying interest in the meantime, the power of maintenance in Lord Cranworth's Act applied (*c*), as does also the power under the recent Act; but where a further contingency is involved in the gift, as in addition to attaining twenty-one the contingency of surviving a particular person, the case does not come within the sections of either of the Acts, and neither the trustees nor the Court can apply the income for maintenance, and there is no obligation to accumulate (*d*).

28. Another question which arises under this section is, whether an infant is entitled to maintenance out of the income of property to which he is entitled contingently on his attaining twenty-one, where, independently of the section, the infant could never have become entitled to the income; as for instance in the case of a pecuniary legacy given by a person not the parent or *loco parentis* to an infant contingently on his attaining twenty-one. This question is not free from difficulty having regard to the state of the law prior to the recent enactment and to the language of the section. By Lord Cranworth's Act where an infant was contingently entitled to property, the trustees were empowered to apply towards the maintenance and education of

[(*b*) *Re Buckley's Trusts*, 22 Ch. D. 583.]

[(*d*) *Re Judkin's Trusts*, 25 Ch. D. 743.]

[(*c*) *Re Cotton*, 1 Ch. D. 232.]

such infants "the whole or any part of the income to which such infant might be entitled in respect of such property:" and it was held in *Re George* (e), that this power did not extend to the case of a contingent pecuniary legacy not carrying interest until the time of payment. In this [*584] state of the law, the Conveyancing * and Law of Property Act, 1881, was passed, and sect. 43 omitted the words "to which such infant might be entitled in respect of such property," but notwithstanding the variation in the language of the late Act, it has been held by the Court of Appeal affirming Kay, J., that the section does not apply to the case of a pecuniary legacy given to an infant contingently on his attaining twenty-one, followed by a residuary gift. In L. J. Cotton's opinion, there is in such a case no property held in trust for an infant within the meaning of the section until the time arises for severing the legacy from the residue, *i.e.*, until the infant attains twenty-one; while in L. J. Fry's opinion, the gift of residue which, independently of the section, carries the income accruing during the minority to the residuary legatee is a sufficient expression of a contrary expression within sub-sect. (3), to take the case out of the Act (a).

29. **Where property held for an infant for life.**—The section of the late Act gives rise to this further difficulty; the power applies to the case of "property held in trust for an infant for life," but the surplus accumulations are to be held "for the benefit of the person who ultimately becomes entitled to the *property* from which the same arise." It is difficult without construing the word "property" in different senses in the same section to attach any other meaning to these words than that the accumulations are to be added to and go with the corpus of the property, and it is conceived that this is the result of the clause, although its effect is to deprive an infant, who has an absolute life interest, of the income accrued during his minority, and not required for his maintenance. The difficulty no doubt arose from the

[(e) 5 Ch. D. 837.]

331; but see *Re Judkin's Trust*, 25[(a) *Re Dickson*, 28 Ch. D. 291, Ch. D. 743.]

297; affirmed on appeal, 29 Ch. Div.

language of Lord Cranworth's Act (which did not apply to a life interest) being copied without the necessary modification, and until the point has been decided it will be prudent, in any instrument giving a life interest to an infant, to insert a maintenance clause and exclude the operation of the section.

30. **Conflicting powers under the recent Act.** — It is to be observed that cases may easily arise in which the trustees would be in a position to exercise either the powers of sect. 42, or those of sect. 43 of the late Act, as for instance if under an instrument coming into operation since the 31st December, 1881, real estate were vested in them in trust for an infant for life, and the trustees had a power of sale or of consenting to the exercise of a power of sale; and as the accumulations of income would or might go in different channels according as the trustees were acting under the one section or the other, they would be placed in a position of *difficulty. It is conceived that if it [*585] were requisite for the trustees to exercise any of the special powers of sect. 42, they would be treated as having entered into possession under that section, and that the accumulations of income would go accordingly, but that in a simple case where the trustees merely received the income as legal owners and had no occasion to exercise any of the powers of sect. 42, the accumulations would go as directed by sect. 43. It would, however, be prudent, in framing any instrument under which the difficulty could arise, to provide for the disposition of the accumulations.]

31. **Out of principal.** — Where the amount of the legacy is inconsiderable, as 100*l.*, the Court would, in the absence of other means, direct maintenance to the child out of the *principal* itself (*a*); the executor, therefore, who, under similar

(a) *Ex parte Green*, 1 J. & W. 253; *Ex parte Chambers*, 1 R. & M. 577; *Ex parte Swift*, *Ib.* 575; *Re Mary England*, *Id.* 499; *Harvey v. Harvey*, 2 P. W. 21; *Ex parte Hays*, 3 De G. & Sm. 485. In *Re Howarth*, 8 L. R. Ch. App. 415, the Lords Justices held that the Court had jurisdiction to

order maintenance, where there were no other means, out of the *corpus* of an infant's freehold estate; and in *De Witte v. Palin*, 14 L. R. Eq. 251, V. C. Malins allowed maintenance to be raised by a charge on reversionary property.

circumstances, but without the authority of the Court, breaks in upon the capital, would not be liable, on the *cestuis que trust's* coming of age, to account for the expenditure (*b*). But where payments of this kind, which are not strictly authorised, are made by executors or trustees, and the propriety of them is questioned in a suit, and there is a deficiency of assets, the costs of suit will have priority over the allowances to the executors or trustees (*c*). Where the legacy was not more than 300*l.*, Sir W. Grant determined that the trustee had exceeded his duty, and said his *impression* was, that the rule had been *never* to permit trustees of their own authority to break in upon the capital (*d*); but the case of *Barlow v. Grant*, which is clearly to the contrary, must have escaped his Honour's recollection (*e*). The *general rule* is, however, not to break into capital for maintenance, and where the legacy is considerable, as 1000*l.*, or the like, as the Court itself would most probably not order the application of part of the principal, the trustee would not be safe in exceeding of his own authority the amount of the interest (*f*).

[*586] *32. **Maintenance where father alive.**—Where the father of an infant is alive, trustees should, in granting maintenance, bear in mind that the Court never allows a *father* maintenance out of his children's property without a previous inquiry as to his ability to maintain them himself (*a*). The term *ability*, however, is relative to the position of the father and children; and maintenance has been allowed to a father who had 6000*l.* a year (*b*). And an express declaration in the instrument of trust, or a previous contract, as in the case of a marriage settlement to which the father is a party, may confer on the father a right to have maintenance

(*b*) *Barlow v. Grant*, 1 Vern. 255; *Carmichael v. Wilson*, 3 Moll. 79; *Bridge v. Brown*, 2 Y. & C. C. C. 181, 189.

(*c*) *Robinson v. Killey*, 30 Beav. 520.

(*d*) *Walker v. Wetherell*, 6 Ves. 473.

(*e*) See also *Prince v. Hine*, 28 Beav. 636.

(*f*) *Barlow v. Grant*, 1 Vern. 255, *per* Lord Guildford; *Davies v. Austen*, 1 Ves. jun. 247; S. C. 3 B. C. C. 178; *Beasley v. Magrath*, 2 Sch. & Lef. 35.

(*a*) See now 23 & 24 Vict. c. 145, s. 26; [since repealed and its place supplied by 44 & 45 Vict. c. 41, s. 43.]

(*b*) *Jervoise v. Silk*, 1 G. Coop. 52; *Ex parte Williams*, 2 Coll. 740; *Culbertson v. Wood*, 5 I. R. Eq. 23, see 41.

for his children out of the settlement funds (*c*). But the decisions in this respect have gone as far as can be justified upon principle (*d*).

[Where there was a power of maintenance in the usual form in the discretion of the trustees, and the trustees without exercising any discretion in the matter paid the whole income to the father of the infant, it was held that the father's estate must account for the income received by him (*e*).

Past maintenance. — Where the father had borrowed money to enable him to keep his infant children at school and was unable to repay the debt, the Court allowed him to be recouped the amount so borrowed as an allowance for past maintenance (*f*).]

33. **After death of father.** — It was formerly much doubted whether after the death of the father maintenance should be granted to the *mother* so long as she continued a *widow* without an inquiry as to her ability (*g*). But it was ruled that *where she had married again* there should be no inquiry as to ability, the second husband being, it was said, under no liability to maintain his wife's children (*h*). It has been since settled that no inquiry as to the mother's ability will be directed even during her widowhood (*i*); and as a widow is undoubtedly liable at law to maintain her children (*j*), the *direction of the inquiry cannot be [*587] regarded as depending upon the *legal liability*. It would seem to follow that the enactment rendering a husband liable to maintain his wife's children by a former marriage (*a*)

(*c*) *Mundy v. Lord Howe*, 4 B. C. C. 223; *Meacher v. Young*, 2 M. & K. 490; *Stocken v. Stocken*, 4 Sim. 152, 2 M. & K. 489, 4 M. & Cr. 95; *White v. Grane*, 18 Beav. 571; *Ransome v. Burgess*, 3 L. R. Eq. 773; *Newton v. Curzon*, 16 L. T. N. S. 696.

(*d*) *Thompson v. Griffin*, Cr. & Ph. 321, *per* Lord Cottenham; [*Wilson v. Turner*, 22 Ch. D. 521;] and see *Re Kerrison's Trusts*, 12 L. R. Eq. 422, the case of a voluntary settlement.

[(*e*) *Wilson v. Turner*, 22 Ch. D. 521.]

[(*f*) *Davey v. Ward*, 7 Ch. D. 754.]

(*g*) As to the mother's right to be recouped for past maintenance of a child, see *Re Cottrell's Estate*, 12 L. R. Eq. 566.

(*h*) *Billingsly v. Critchet*, 1 B. C. C. 268.

(*i*) *Douglas v. Andrews*, 12 Beav. 310; and see the note, p. 311.

(*j*) 43 Eliz. c. 2, s. 6; 4 & 5 W. 4, c. 76, s. 56.

(*a*) 4 & 5 W. 4, c. 76, s. 57.

ought not to make (and it is believed that it has not in fact made) any alteration in the practice of the Court of granting maintenance where the mother has married again without any inquiry as to ability.

[34. **Where accumulation directed.** — Where a testator left property to the value of 10,000*l.* a year to be accumulated for twenty-one years, and directed that the accumulations should be laid out in the purchase of lands which, after the expiration of the twenty-one years, were to be held for A. for life, and after his death for his sons in strict settlement, and A.'s income was insufficient to enable him to bring up and educate his infant sons in a manner suitable to their prospective position in life, V. C. Malins allowed him 2,700*l.* a year out of the income of the property, with liberty to apply for an increased allowance if necessary when the children grew older (*b*). But in a subsequent case in Ireland where the circumstances were similar, the Court refused to follow the decision of V. C. Malins, and held that where there is an imperative trust to accumulate, it is the duty of the Court to carry out the testator's intention, and that the Court has no discretion to allow maintenance out of the income (*c*); and the Irish decision seems to be in accordance with sound principle.

35. **Interests of third parties protected.** — Where an accumulation has been directed by a testator, and the Court allows maintenance out of the accumulations, the order should be framed so as to protect the interests of third parties by directing the interests of the infants in any legacy or share of residue to be held as a security for recouping any diminution in the accumulations (*d*).

Where an infant was entitled, contingently on her attaining twenty-one or marrying, to a large property, the Court sanctioned a scheme for providing for her past and future maintenance, by effecting a policy of assurance payable on

[(*b*) *Havelock v. Havelock*, 17 Ch. D. 807; and see *Bennett v. Wyndham*, 23 Beav. 521; and S. C. 4 De G. F. & J. 259.]

[(*c*) *Kemmis v. Kemmis*, 13 L. R. Ir. 372; following *Shaw v. M'Mahon*,

8 Ir. Eq. R. 584; affirmed 15 L. R. Ir. 90.]

[(*d*) *Re Colgan*, 19 Ch. D. 305; see this case and *Re Arbuckle*, 2 Set. on Dec. 4th Ed. 726, for form of order providing for the recoupment.]

her death before either attaining twenty-one or marrying under that age, and mortgaging the policy and charging the infant's contingent interest to secure the necessary advances and compound interest, but it was expressly * provided that the interest of any person other than [*588] the infant was not to be affected (a).]

36. **Advancement out of capital.**—A part of the capital may be sunk by a trustee without the direction of the Court for the *advancement* of a child, where the same sums if expended for *maintenance* would not have been allowed (b).

37. **Advancement when there is a limitation over.**—But a trustee cannot apply part of the principal towards the advancement of the child where the legacy is subject to a limitation over in favour of a stranger, for in such a case the Court itself could not make an order to that effect.

Thus in *Lee v. Brown* (c), where a testatrix gave 100*l.* to trustees upon trust to apply the produce to the maintenance and education of A. B., and when he should attain twenty-one to transfer to him the capital, but in case he died under

[(a) *Re Bruce*, 30 W. R. 922; and see *Re Tanner*, 53 L. J. N. S. Ch. 1108; 51 L. T. N. S. 507, as to adopting a similar course for securing the other persons interested where an advance is required for an infant whose interest is only contingent.]

(b) *Swinnock v. Crisp*, Freem. 78; *Walker v. Wetherell*, 6 Ves. 477; and see *Ex parte M'Key*, 1 B. & B. 405. As to what purposes will fall under the description of advancement, see *Boyd v. Boyd*, 4 L. R. Eq. 305; *Roper-Curzon v. Roper-Curzon*, 11 L. R. Eq. 452; *Re Gore's Settlement Trusts*, W. N. 1876, p. 79; *Taylor v. Taylor*, 20 L. R. Eq. 155. In the last case an advancement by way of *portion* was said to be something given by a parent to establish his child in life, a provision for him, and not a casual payment. Under portions would be ranked the following, viz. sums advanced on *marriage*, on setting up a child in *business* or putting him into a *profession*, buying the *goodwill* of a

business and giving *stock-in-trade*, or supplying *further capital* for carrying on the business, or paying the *entrance fee* to an *Inn of Court* with a view to the Bar, or buying a *commission* and providing the *outfit*. So a large sum given to a child in *one payment* might be presumed in the absence of evidence to be an advancement by way of *portion*. But the qualities of a portion would not attach to *small sums* paid by a father to a child whether an infant or adult, or to *temporary assistance* in the discharge of his debts, or to payment of his *travelling expenses*, as a passage to India, or to the payment of a *fee* to a *special pleader*, which would come rather under preliminary education than advancement. But in the case of *Re Blockley*, 29 Ch. D. 250, Pearson, J., dissented from the view that a sum given by a father to his son to enable him to pay his debts could not be treated as an advancement.

(c) 4 Ves. 362.

that age the testatrix gave the legacy to his brother and sister equally, Lord Alvanley said, "It certainly was not competent under this trust to the executor, nor could he, *if he had applied*, have obtained permission from this Court, to advance any part of the capital of the legacy in putting the child out in the world; for *if it had been such a case that the Court would have authorised the act that was done*, I desire to be understood that it would be considered as properly done; for the principle is now established, that if an executor does without application what the Court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application" (d). But

[*589] where an infant was entitled, on a contingency, * and at a certain time but which had not arrived there was a power of advancement, and the trustee took upon himself the risk as against the person entitled if the contingency did not happen, and applied part of the capital for the advancement of the infant, he was allowed it in his account as between him and the infant who in the event became entitled (a).

38. Where there are cross limitations amongst the children.

—And where legacies were given to children payable at twenty-one or marriage, with a limitation over on the death of any child before attaining twenty-one or marriage, *not in favour of a stranger, but for the benefit of such of the children as should attain twenty-one or marry*, a trustee, who had paid a premium on the apprenticeship of a child who died under twenty-one was allowed it by the Court (b). The case turned upon the same principle as where a legacy is given to a class, all or some of whom must take the fund absolutely, when, as all have an equal chance of survivorship, the individuals of the class will be ordered maintenance even before their shares in the fund have become actually vested (c). This power is exercised by the Court, but cannot be exer-

(d) *Ib.* 369.

(a) *Worthington v. M'Craer*, 23 Beav. 81.

(b) *Franklin v. Green*, 2 Vern. 137. That the limitation over was for the benefit of the children is not men-

tioned in the report, but appears from Reg. Lib.

(c) See *Rop. Leg.* chap. xx. s. 5; *Greenwell v. Greenwell*, 5 Ves. 194; *Cavendish v. Mercer*, cited *Ib.*; *Brandon v. Aston*, 2 Y. & C. C. C. 30.

cised by trustees without the authority of the Court, nor can the Court itself make such an order in a summary way without the institution of a suit (*d*).

[39. **Where consent of bankrupt tenant for life required.**—Where there is a power of advancement with the consent of the tenant for life, and the tenant for life becomes a bankrupt, his power of consenting is not extinguished, but can only be exercised with the consent of his trustee in bankruptcy acting under the directions of the Court of Bankruptcy (*e*).]

40. **General power of advancing tenant for life.**—Where trustees had a power to apply a moiety of a trust fund in or towards the preferment or advancement of the tenant for life, or *otherwise for his benefit*, in such a manner as they should in discretion think fit, it was held that they might apply the moiety in payment of the debts of the tenant for life, the interest of which absorbed nearly the whole of his income and the principal of which he was unable to pay out of his own resources (*f*). [So a power of applying the capital for the benefit and advancement in the world of the tenant for life, coupled with words showing that the power * of advancement was a large one, has been [*590] held to justify applications of the trust funds for the benefit of the tenant for life which were not strictly advancements (*a*).]

41. **Debts barred by the Statute of Limitations.**—An executor has never been held responsible for paying a debt due and owing from the testator's estate, the remedy for which has been barred by the Statute of Limitations; and upon the same principle he may retain his own debt though barred (*b*). But an executor would not be at liberty to pay such a debt after a decree for the administration of the testator's estate, for from that time any other creditor, or even a legatee, specific, pecuniary, or residuary, may plead the statute in taking

(*d*) *Re Breeds' Will*, 1 Ch. D. 226.

[(*e*) *Re Cooper*, 27 Ch. D. 565.]

[(*f*) *Lowther v. Bentinck*, 19 L. R. Eq. 166; and see *Re Breeds' Will*, 1 Ch. D. 226; *Re Gore's Settlement Trusts*, W. N. 1876, p. 79.]

[(*a*) *Re Brittlebank*, 30 W. R. 99.]

(*b*) *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166; *Hunter v. Baxter*, 3 Giff. 214; *Dring v. Greetham*, 1 Eq. Rep. 442; *Louis v. Rumney*, 4 L. R. Eq. 451.

the accounts (*c*), except to the debt of a plaintiff in a creditors' suit, to which debt the defendant, the executor, did not plead the statute by his statement of defence, and on the basis of which the decree has been made (*d*). If after a decree neither the executor nor the parties beneficially interested before the Court plead the statute, the Court will not set up the statute on behalf of absent parties, but if the executor omits to plead the statute, it is at his own risk (*e*).

42. **Promise of subscription.** — It sometimes happens that the deceased made some promise, written or verbal, to subscribe a certain sum for the promotion of some "charitable or public purpose." If nothing has been done in consequence of such promise, the executor or administrator must treat the promise as voluntary, and therefore null. But if other persons have acted on the faith of the promise and would suffer loss if it were not observed, the executor or administrator, it is conceived, would be justified in giving it effect (*f*).

[43. **When trustees may apply under Settled Estates Act.** — If an estate is vested in trustees and there is not for the time being any beneficial owner of the rents and profits, the trustees are the proper persons to apply to the Court under the 23d sect. of the Settled Estates Act, 1877, to exercise the powers conferred by the Act (*g*).]

44. **Power to release or compound debts.** — A trustee may, under circumstances, release or compound a debt (*h*). But if a trustee release or compound a debt without [**591*] *some sufficient ground in justification (*a*), or if he sell the debt for a grossly inadequate considera-

(*c*) See *Fuller v. Redman*, 26 Beav. 614; *Shewen v. Vanderhorst*, 1 R. & M. 347; 2 R. & M. 75; *Dring v. Greetham*, 1 Eq. Rep. 442.

(*d*) *Adams v. Waller*, 35 L. J. N. S. Ch. 727; *Fuller v. Redman* (No. 2), 26 Beav. 614; *Briggs v. Wilson*, 5 De G. M. & G. 12; S. C. 2 Eq. Rep. 153; *Ex parte Dewdney*, 15 Ves. 496.

(*e*) *Alston v. Trollope*, 2 L. R. Eq. 205; S. C. 35 Beav. 466; and see *Dring v. Greetham*, 1 Eq. Rep. 442.

(*f*) See *Cooper v. Jarman*, 3 L. R. Eq. 98; *Baxter v. Gray*, 3 Man. & G. 771; *Shallcross v. Wright*, 12 Beav. 558.

[(*g*) *Vine v. Raleigh*, W. N. 1883, p. 128.]

(*h*) *Blue v. Marshall*, 3 P. W. 381; and see *Ratcliffe v. Winch*, 17 Beav. 216; *Forshaw v. Higginson*, 8 De G. M. & G. 827.

(*a*) *Jevon v. Bush*, 1 Vern. 342; *Gorge v. Chansey*, 1 Ch. Rep. 125;

tion (*b*), he will clearly be answerable to the *cestuis que trust* for the amount of the *devastavit*.

23 & 24 Vict. c. 145. — Executors under wills *executed after the 28th August, 1860*, [were by Lord Cranworth's Act] expressly authorised "to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they should think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, without being responsible for any loss to be occasioned thereby" (*c*).

[44 & 45 Vict. c. 41. — But this section has been repealed and its place supplied by the Conveyancing and Law of Property Act, 1881, which as to executorships and trusts constituted or created either before or after the commencement of the Act provides by sect. 37, that (1) "an executor may pay or allow any debt or claim on any evidence that he thinks sufficient"; (2) "an executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, claim, or thing whatever relating to the testator's estate or to the trust," and may execute and do all such releases and things as may seem expedient without being responsible for any loss occasioned by anything done in good faith. But as regards trustees the section is subject to any contrary intention expressed in the instrument creating the trust (*d*).

In exercising the powers of this section in a case where

Wiles v. Gresham, 5 De G. M. & G. 770. A trustee is not liable for omitting to compound; *Ex parte Ogle*, 8 L. R. Ch. App. 715, *per Cur.*
(*b*) *Re Alexander*, 13 Ir. Ch. Rep. 137.

[This section was held not to be confined to claims in the nature of debts, but to extend to claims of legatees, *Re Warren*, 53 L. J. N. S. Ch. 1016; 51 L. T. N. S. 561; 32 W. R. 916.]

[(*d*) 44 & 45 Vict. c. 41, ss. 37,

(*c*) 23 & 24 Vict. c. 145, s. 30. 71.]

there are several trustees, it is conceived that *all the trustees* must "act together," except in cases in which, independently of the section, a majority of the trustees are by law capable of binding the minority (e). The object of the section was not to enable some of the trustees to act without the concurrence of their co-trustees.

[*592] * It will be observed that the powers of this section are only exercisable by a sole acting trustee in cases where a sole trustee is by the instrument, if any, creating the trust "authorised to execute the trusts and powers thereof," but by the 38th section, as to trusts created by instruments coming into operation after the 31st December, 1881, any trust or power vested in two or more trustees jointly, in the absence of a contrary intention in the instrument creating the trust or power, may be exercised or performed by the survivor for the time being, and it seems to follow that in the case of trusts falling within this section the powers of sect. 37 may be exercised by a sole surviving trustee.

This section has largely extended the powers of executors and trustees, and it would seem that in future the only question will be whether the executors or trustees have acted in good faith in relation to any of the matters authorised by the section.

Discretion of executors.—Independently of the section, executors have a fair discretion whether they will press a debtor for payment, and will not be held liable for wilful neglect or default if they have exercised their discretion honestly and fairly in giving time to a debtor although loss may result from the delay (a).]

45. **Settlement with one residuary legatee.**—Executors and trustees of a will when they have discharged the funeral and testamentary expenses, debts and legacies, may come to a final account with one of the residuary legatees separately, and if such residuary legatee be paid only what is his fair share at the time, he will not be made to account to the

[(e) As to a majority binding a minority in charity trusts, see *ante*, p. 259; and see *post*, p. 597.]

[(a) *Re Owens*, 47 L. T. N. S. 61.]

other residuary legatees, if the undistributed part afterwards become depreciated or lost (b).

46. Appropriation of residue.— Where the residue consists of a great variety of securities, the question arises whether the trustees in the absence of any special power can *virtute officii*, where infants are concerned, divide the residue by appropriating some securities to one residuary legatee and other securities to another, but so that the distribution is a fair one according to the market price of the day of the funds so appropriated. The *Court* can make such an apportionment, for in a suit guardians *ad litem* of the infants are appointed and are heard on their behalf to protect their interests; but out of Court where the voice of the infants cannot be heard, it would be unsafe for trustees to make such an apportionment on their own responsibility. However, where trustees are directed to invest the infants' share on any particular securities, they might accept securities of * the nature prescribed at the market price, as the [*593] transaction when resolved would be the payment of so much money, and the investment of it by the trustees in the requisite securities. Where there are no special powers, the trustees should turn the whole of the irregular species of property into money and divide the proceeds.

45. Release of equity of redemption.— Trustees of an *equity of redemption* of lands mortgaged for more than their value, may, it is conceived, release the equity of redemption to the mortgagee, rather than be made defendants to a foreclosure suit, the cost of which, so far as incurred by themselves, would fall upon the trust estate.

46. Whether trustees mortgagees can release part of the land in mortgage.— Where trustees are *mortgagees* they are often requested to release part of the land from the security, in order to enable the mortgagor to deal with it for his own convenience. Where the value of the land is not excessive as compared with the debt, it would, of course, be a gross breach of trust to deteriorate the security. But suppose the value of the part left in the mortgage to be (say) double the amount of the debt, may the trustees release the residue?

(b) *Peterson v. Peterson*, 3 L. R. Eq. 111.

It is presumed that trustees can never justify the abandonment of any part of the security on the mere ground of consulting the convenience of the mortgagor; and they must be prepared to show that the act was calculated under the circumstances to promote the interest of the *cestuis que trust*. But if the mortgagor be ready to pay off the mortgage on a transfer of the security, unless the trustees will consent to release, and the existing mortgage, even when confined to the narrower parcels, is a clearly beneficial one and the value still abundantly ample, the trustees would surely incur no responsibility by acceding to the arrangement (a). The prevailing opinion of conveyancers appears to be that where trustees have a power of investing on mortgage and of varying securities (which a power of investing on mortgage implies) the transaction will be considered as tantamount to repayment of the mortgage money, and reinvestment by the trustees on a mortgage of the hereditaments retained as a security, and that the purchaser of the released hereditaments is not bound to see to the sufficiency of the new security, or that the acceptance of the new security does not involve a breach of trust (b).

[47. **Whether bound to consolidate mortgages.** — It is conceived that although trustees holding independent securities from the same mortgagor may have the right to consolidate them, it is not imperative upon them to do so, but [*594] that they * may deal with the securities independently, or allow one or more of them to be redeemed, without incurring any liability for loss which may arise from the subsequent depreciation in the other securities. They should, however, satisfy themselves before parting with any of the securities, or allowing any of them to be redeemed, that the margin of value on those which are retained is then sufficient to justify a present advance to the amount remaining due to the trustees upon such securities.]

48. **Discharge of a mortgage on a settled estate.** — Trustees of a settled estate with a power of sale and reinvestment

(a) See *Whitney v. Smith*, 4 L. R. Ch. App. 513; *Pell v. De Winton*, 2 De G. & J. 13.

(b) See *Davidson's Preced.* vol. ii. p. 835, 3d ed.; *Dart's V. & P.* vol. ii. p. 612, 5th ed.

may, it is conceived, sell part of the estate to pay off a mortgage affecting the estate though not mentioned in the settlement, for this in substance is a reinvestment, and *à fortiori* if the trustees have a power of investing on real securities until a purchase can be found, they can sell part of the estate and apply the proceeds in taking a transfer of the mortgage, provided it be an adequate security.

49. **Sale of limited interests.** — Trustees for sale of a limited interest in an estate (as a remainder), or of an aliquot part of the estate (as an undivided one-fourth), may concur with the other parties in a sale of the whole estate for one entire sum, and may agree afterwards as to the apportionment of the purchase-money, and if the parties cannot agree the apportionment will be made by the Court (*a*). But otherwise, if there be not any intelligible principle upon which the apportionment can be made (*b*).

50. **Reimbursement of expenses on account of the trust.** — A trustee may reimburse himself a sum of money *bond fide* advanced by him for the benefit of the *cestui que trust*, or even for his own protection in the execution of his office. For, "As it is a rule," said Lord Chancellor King, "that the *cestui que trust* ought to save the trustee harmless, so within the reason of that rule, when the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from being liable for the whole money lent, or from a plain and great hazard of being so, he ought to be repaid" (*c*).

51. **Power of trustees for sale to clear the estate.** — A trustee for sale has been held to be justified in applying part of the purchase-money in paying off a charge without satisfaction of which the purchaser refused to complete, and which the trustee was professionally advised was still subsisting, though the charge itself was open to doubt (*d*).

* 52. **Power to grant leases.** — A trustee of lands [*595]

(a) *Clark v. Seymour*, 7 Sim. 67; 10 Jur. N. S. 1246; S. C. 4 De G. J. Rede *v. Oakes*, 32 Beav. 555; see & S. 505.
 Earl Powlett *v. Hood*, 5 L. R. Eq. (c) *Balsh v. Hyham*, 2 P. W. 463.
 115, and *ante*, p. 430. (d) *Forshaw v. Higginson*, 8 De

(b) *Rede v. Oakes*, 32 Beav. 555; G. M. & G. 827.

may grant a reasonable husbandry lease (*a*), in the fair management of the estate (*b*). But he has no power to demise where it is a simple trust, and the *cestui que trust* is in possession, except he do it with the *cestui que trust's* concurrence. And *primâ facie* a trustee for *sale* would not be justified in granting a lease (*c*). And though a trustee may grant a farming lease, it does not follow that he could grant a *mining lease*, for the latter is *pro tanto* a destruction of the *corpus* (*d*).

[Trustees having power to grant leases to "any person or persons" may lease to a limited company (*e*).

By sect. 43 of the Agricultural Holdings (England) Act, 1883 (*f*), when, by any instrument, a lease of a holding is authorised to be made, provided that the best rent or reservation in the nature of rent is reserved, on a lease to the tenant of the holding, it shall not be necessary, in estimating such rent or reservation, to take into account against the tenant the increase (if any) in the value of such holding arising from improvements made or paid for by him.]

53. **Powers of directors, &c.**—The managers of a trading company or partnership have no power, whatever the necessity of the case, to borrow money beyond the capital prescribed by the Act or deed of settlement, so as to give the lenders a remedy against the company (*g*). And where, without any special authority being conferred by the deed of settlement, money is borrowed for launching or enlarging the concern, the managers (though made to pay upon their personal liability under the contract) have no remedy over against the other members of the company (*h*). But every

(*a*) See *Naylor v. Arnitt*, 1 R. & M. 501; [*Fitzpatrick v. Waring*, 11 L. R. Ir. 35;] *Bowes v. East London Waterworks Company*, Jac. 324; *Drohan v. Drohan*, 1 B. & B. 185; *Middleton v. Dodswell*, 13 Ves. 268; [and cf. *Ferraby v. Hobson*, 2 Phil. 255.] But see *contra*, *Wood v. Patteson*, 10 Beav. 541; *Re Shaw's Trust*, 12 L. R. Eq. 124.

(*b*) See *Attorney-General v. Owen*, 10 Ves. 560.

(*c*) *Evans v. Jackson*, 8 Sim. 217; and see *Micholls v. Corbett*, 34 Beav. 376.

(*d*) *Wood v. Patteson*, 10 Beav. 544.

(*e*) *Re Jeffcock's Trusts*, 51 L. J. N. S. Ch. 507.

(*f*) 46 & 47 Vict. c. 61.

(*g*) *Burmester v. Norris*, 6 Exch. 796; *Ricketts v. Bennett*, 4 C. B. 686; and see *Hawtayne v. Bourne*, 7 M. & W. 595; *Hawken v. Bourne*, 8 M. & W. 703.

(*h*) *Re Worcester Corn Exchange*

business must be carried on at either a profit or loss, and as the members of the company take the profit, they must also bear the loss, and therefore if the managers incur debts or expenses by employing labour or ordering goods *in the ordinary course of business*, or borrow money and apply it to these purposes, they must be indemnified in equity by the other members of the company (*i*).

* 54. **Trustees' shares.** — Trustees of shares in an [*596] unlimited Banking Company have no power, unless specially authorised by their settlement, to accept *new shares* allotted to them though issued at a premium (*a*).

55. **Enfranchisement.** — By 15 & 16 Vict. 51, s. 32, trustees of *copyholds* were empowered on *enfranchisement* to charge the expenses on the estate enfranchised, but this section was repealed by 21 & 22 Vict. c. 94, s. 2, and re-enacted in effect by the 21st section, which authorises all persons enfranchising to charge the expenses with the consent of the commissioners on the estate. Any enfranchisement of a trust estate should be made to the trustee who has the legal estate, and not to the *cestui que trust* (*b*).

[56. **Enlarging long term into fee.** — By the Conveyancing and Law of Property Act, 1881, trustees in receipt of the income in right of a long term, or having the term vested in them in trust for sale, may exercise the powers of the Act for enlargement of the term into a fee simple. The estate in fee simple so acquired is to be subject to all the same trusts, powers, executory limitations over, rights, and equities as the term would have been subject to if it had not been enlarged. But where such long leaseholds have been settled in trust by reference to freeholds so as to go along with them as far as the law permits, and at the time of the enlargement the ultimate beneficial interest in the term has not become absolutely and indefeasibly vested, the estate in

Company, 3 De G. M. & G. 180; *Ex parte Chippendale*, 4 De G. M. & G. 43; see *Australian &c. Company v. Mounsey*, 4 K. & J. 733.

(*i*) *Ex parte Chippendale*, 4 De G. M. & G. 19; *Troup's case*, 20 Beav. 353; *Hoare's case*, 30 Beav. 225.

(*a*) *Sculthorpe v. Tipper*, 13 L. R. Eq. 232; [and see *Re Morris*, 54 L. J. N. S. Ch. 388.]

(*b*) See *Minton v. Kirwood*, 3 L. R. Ch. App. 614.

fee simple is, without prejudice to any conveyance for value previously made, to be conveyed and settled, and devolve in the same manner as the freeholds (c).

57. Compensation for agricultural improvements. — By the Agricultural Holdings (England) Act, 1883 (d), a tenant who has made on his holding certain improvements specified in the schedule to the Act is entitled on quitting his holding at the determination of his tenancy to compensation from the landlord for such improvements to be ascertained as provided by the Act. But by sect. 31, where the landlord is a trustee, the amount of compensation is not to be recoverable from him personally, but is to be charged on and recoverable against the holding only. And by sect. 42, subject to certain provisions as to Crown, duchy, ecclesiastical, and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements, in respect of which compensation is [*597] payable under the Act, as if he were, in the * case of an estate of inheritance owner thereof in fee, and in the case of a leasehold possessed of the whole estate in the leasehold.]

58. Powers of majority of trustees. — The general powers allowed to trustees must in a private trust be exercised by all the trustees as a *joint body*, but in *charitable* or *public* trusts the voice of the *majority* will bind the rest, and in certain cases the majority can give effect to their resolution by passing the legal estate under a statutory power (a).

59. Case of suit instituted and a decree made. — The powers assigned in the preceding pages to trustees must be taken subject to the qualification, that, if a *suit* has been instituted for the execution of the trust, and a *decree made*, the powers of the trustees are thenceforth so far paralysed that the authority of the Court must sanction every subsequent proceeding (b). Thus the trustees cannot commence or defend

[(c) 44 & 45 Vict. c. 41, s. 65;
and see 45 and 46 Vict. c. 39, s. 11.]

[(d) 46 & 47 Vict. c. 61.]

(a) See *supra*, pp. 540, 547.

(b) *Mitchelson v. Piper*, 8 Sim. 64;
Shewen v. Vanderhorst, 2 R. & M.
75; S. C. affirmed, 1 R. & M. 347;
Minors v. Batteson, 1 App. Cas. 428.

any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing (*c*): a trustee for sale cannot sell (*d*): the committee of a lunatic cannot make repairs (*e*): an executor cannot pay debts (*f*), or deal with the assets for the purpose of investment (*g*). But an executor as to a chattel, not the subject of the suit *specifically*, can after decree give a good title to a *bonâ fide* purchaser not having actual notice of the *lis pendens* (*h*), and it is presumed that he can equally, where there is no receiver appointed, sign a valid receipt for any part of the testator's personal estate. But where an administration action has been heard on further consideration, and no subsequent further consideration has been reserved, but general liberty to apply has been given, trustees may exercise their powers without obtaining the sanction of the Court.¹

60. **Case of suit and no decree.**—An action in which a *writ* merely has been issued is distinguishable from one in which a *decree* has been made, for until decree the plaintiff may dismiss his action at any moment, and should he do so, the progress of the trust may have been arrested for no purpose (*i*). However, even in this case the trustees cannot be advised to act without first consulting the Court, and if by acting independently of the Court expenses be incurred which might have *been avoided had the [*598]

(*c*) See *Jones v. Powell*, 4 Beav. 96. The court is sometimes reluctant to give leave to institute or defend a suit, but holds out that if the trustee or executor acts *bonâ fide* the Court will protect him. The reason for this disinclination no doubt is that the application to the Court is *ex parte*, and is sometimes made a vehicle for multiplying costs. However, the Court frequently gives such leave, and a trustee or executor cannot be advised to commence or defend a suit without, at least, submitting the case to the Court, though no order may be made.

(*d*) *Walker v. Smalwood*, Amb. 676; *Annesley v. Ashurst*, 3 P. W. 282.

(*e*) *Anon. case*, 10 Ves. 104.

(*f*) *Mitchelson v. Piper*, 8 Sim. 64; *King v. Roe*, L. J. May, 27, 1868; *Irby v. Irby*, 24 Beav. 525; and see *Jackson v. Wooley*, 12 Sim. 13.

(*g*) *Widdowson v. Duck*, 3 Mer. 494; *Bethell v. Abraham*, 17 L. R. Eq. 24.

(*h*) *Berry v. Gibbons*, 8 L. R. Ch App. 747.

(*i*) *Cafe v. Bent*, 3 Hare, 240; *Neeves v. Burrage*, 14 Q. B. 504.

¹ *Re Mansel*, 52 L. T. N. S. 806; 33 W. R. 727; 54 L. J. Ch. 883.

trustees applied to the Court, they may be made to bear them personally (*a*).

61. **Duties of executor after institution of suit.**—Even after a *decree* made the trustee is not absolved from the duties imposed by his office. Thus after a decree in an administration suit an executor was held liable for having allowed a policy of insurance to drop without any sufficient reason (*b*).

SECTION II.

THE SPECIAL POWERS OF TRUSTEES.¹

Upon this branch of our subject we shall consider, *First*, The different kinds of powers; *Secondly*, The construction of powers; *Thirdly*, The effect of disclaimer, assignment of the estate, and survivorship among the trustees; *Fourthly*, The control of the Court over the exercise of powers; [and *Fifthly*, The restrictions on the powers of trustees imposed by the Settled Land Acts.]

(*a*) *Attorney-General v. Clack*, 1 Beav. (b) *Garner v. Moore*, 3 Drew. 277. 467; and see *Cafe v. Bent*, 3 Hare, 249.

¹ *Special powers.*—These must be strictly executed, according to their terms; *Alley v. Lawrence*, 12 Gray, 373; *Ladd v. Ladd*, 8 How. 30; a power of sale may be executed by the surviving trustee, or other person acting in a fiduciary capacity; *Parker v. Sears*, 117 Mass. 513; *Gould v. Mather*, 104 Mass. 283; *Jackson v. Given*, 16 Johns. 167; *Putnam School v. Fisher*, 30 Me. 526; *Sharp v. Pratt*, 15 Wend. 610; *Hunt v. Rousmaniere*, 2 Mason, 244. There are local statutes controlling in many states, but these may or may not apply to directory powers; *Mallet v. Smith*, 6 Rich. Eq. 22; *Clay v. Hart*, 7 Dana, 1; *Taylor v. Morris*, 1 Const. 341; this depending upon whether the settlor intended to give such an elastic power to particular individuals, or to any who might chance to hold the office of trustee; *Shelton v. Homer*, 5 Met. 462; *Lorings v. Marsh*, 6 Wall 337; *Gray v. Henderson*, 71 Pa. St. 308; *Ferre v. American Board*, 53 Vt. 171; *Alley v. Lawrence*, 12 Gray, 373; *Peterson's App.* 88 Pa. St. 397; *Gould v. Mather*, 104 Mass. 286. There may be a power of sale by implication; *Peter v. Beverly*, 10 Pet. 532; *Gray v. Henderson*, 71 Pa. St. 368; *Meakings v. Cromwell*, 2 Sandf. 512.

If new trustees are appointed, the powers exercised by their predecessors will not necessarily extend to them; *Burdick v. Goddard*, 11 R. I. 516; but statutes in some instances provide for this; *Murray v. Dehon*, 102 Mass. 11.

Special as well as general powers may be discretionary; *Loring v. Blake*, 98 Mass. 253; *Lyman v. Parsons*, 26 Conn. 493. Courts may interfere to control the exercise of powers; *Druid Park Heights Co. v. Oettinger*, 53 Md. 63; *Trustees v. Northampton*, 10 Allen, 498; and so too if a trustee cannot

I. Of the different kinds of powers.

1. **Powers legal and equitable distinguished.** — In applying the doctrine of powers to the subject of trusts it may be useful to regard powers as either *legal* or *equitable*: the former, such as operate upon the legal estate, and so are matter of cognizance in Courts of common law; the latter, such as affect the equitable interest only, and so fall exclusively under the notice of Courts of equity. Thus, if lands be limited to the use of A. for life, remainder to B. and his heirs, and a power operating under the Statute of Uses be given to C., the execution of the power works a conveyance of the legal estate; but if lands be limited to the use of A. and his heirs upon trust for B. for life, and after his death for C. and his heirs, and a power not operating under the Statute of Uses be given either to the trustee or to the *cestui que trust*, the execution of such a power will have no effect at law, but will merely serve to transfer the beneficial interest in equity, and may therefore be designated by the name of an equitable power.

2. **Equitable powers, whether annexed to the estate or simply collateral.** — An *equitable*, the same as a legal power, may be either annexed to the estate or be simply collateral; but whether it shall be taken as the one or the other will depend on the question, whether *the donee of [*599] the power be possessed of the *equitable*, that is, of the *beneficial* interest or not. Thus, where a testator devised

execute a trust the courts will do it; *Ferre v. American Board*, 53 Vt. 171; but this does not apply to purely discretionary powers; *Eldredge v. Heard*, 106 Mass. 582; *Smith v. Wildman*, 37 Conn. 384; *Littlefield v. Cole*, 33 Me. 552; *Mason v. Mason*, 4 Sandf. Ch. 623; except in special cases; *Pulpress v. African Church*, 48 Pa. St. 210; a trustee may exercise a discretionary power, though he has agreed upon his conduct with the settlor; *Library Co. v. Williams*, 73 Pa. St. 249.

A power is terminated when it becomes impossible to execute it; *Hetzel v. Barber*, 69 N. Y. 1.

As to what will be considered an execution of a power, see *Hamilton v. Crosby*, 32 Conn. 342; *Bingham's App.* 64 Pa. St. 350; *Amory v. Meredith*, 7 Allen, 397; *Collier's Will*, 40 Mo. 287; *Clark v. Hornthal*, 47 Miss. 434.

If a power is a condition precedent, as the right to assent to a marriage, everything else will await and depend upon its execution; *Taylor v. Mason*, 9 Wheat. 350; *Hawkins v. Skeggs*, 10 Humph. 31; *Phillips v. Medbury*, 7 Conn. 568.

an estate to his *sister* and her heirs for ever, upon trust to settle it on such of the descendants of the testator's mother as his *sister* should think fit, and the devisee having married, the question was raised whether the execution of the power by her, as she was under coverture at the time, was to be considered as valid, Lord Hardwicke held that this was a power *without an interest*, i.e., without any beneficial interest and could therefore be executed by the *feme covert* (a). On the other hand where the legal estate was devised to *trustees* in fee upon trust for an infant *feme covert* for her sole and separate use during her life, and upon trust to permit her by deed or writing executed in the presence of three or more witnesses, notwithstanding her coverture, to dispose of the estate as she should think fit, and the testator died leaving the *feme covert* his heir-at-law, and she, during the continuance of the coverture and infancy, exercised the power by will, Lord Hardwicke, upon the question whether the power had been duly executed, observed, that this was a power *coupled with an interest*, which was always considered different from naked powers: it was admitted that if this execution was to operate on the estate of the infant it might not be good: now this was clearly so, for she had the trust in equity for life, with the trust of the inheritance in her in the meantime, so that this was directly a power over *her own inheritance*, which could not be executed by an infant (b).

[3. **Exercise of powers by infant.** — In the case of personal estate, however, an infant may exercise a power in gross. Thus, where under a marriage settlement an infant *feme covert*, to whom the income of the settled property was given for her life for her separate use, had, in the events which happened, a general power limited to her of appointing the trust funds, after her death and subject to the interest of her husband, by deed or will, and she exercised the power by deed, and died an infant, it was held by the late M. R. and affirmed by the Court of Appeal, *dissentiente*

(a) *Godolphin v. Godolphin*, 1 Ves. 298; see 306; and see *Blithe's case*, 21. Freem. 91; *Penne v. Peacock*, For.

(b) *Hearle v. Greenbank*, 1 Ves. 43.

Cotton, L. J., that the power was well exercised, and the M. R. observed "If it is clearly settled that the first class of powers — powers simply collateral — can be exercised by an infant, there can be no reason why the second class of powers — powers in gross — should not be so exercised when the exercise cannot affect the infant's interest; I can see no sufficient distinction between * the two cases. It [*600] can make no difference that the infant has some interest under the settlement, so long as that interest cannot be affected by the exercise of the power" (a).]

4. **Bare powers, and powers coupled with a trust.** — Again, powers, in the sense in which the term is commonly used, may be distributed into *mere powers*, and *powers coupled with a trust* (b). The former are powers in the proper sense of the word; that is, *not imperative*, but purely *arbitrary*; powers which the trustee cannot be compelled to execute, and which, on failure of the trustee, cannot be executed vicariously by the Court (c). The latter, on the other hand, are *not arbitrary*, but *imperative*, have all the nature and substance of a trust, and ought rather, as Lord Hardwicke observed, to be designated by the name of trusts (d). "It is perfectly clear," said Lord Eldon, "that where there is a *mere power*, and that power is not executed, the Court cannot execute it. It is equally clear, that wherever a *trust* is created, and the execution of the trust fails by the death of the trustee or by accident, this Court will execute the trust. But there are not only a *mere trust* and a *mere power*, but there is also known to this Court a *power which the party by whom it is given is intrusted and required to execute*; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has the duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place" (e).

[(a) *Re D'Angibau*, 15 Ch. D. 228; and see *ante*, pp. 37, 38.]

(b) See *Gower v. Mainwaring*, 2 Ves. 89; *Cole v. Wade*, 16 Ves. 43; *Hutchinson v. Hutchinson*, 13 Ir. Eq. Rep. 332.

(c) See *Cowper v. Mantell*, 22 Beav. 231, and cases there cited; and *Re Eddowes*, 1 Dr. & Sm. 395.

(d) *Godolphin v. Godolphin*, 1 Ves. 23.

(e) *Brown v. Higgs*, 8 Ves. 570.

5. **Strict powers, and powers directory.**—Again, powers have been dealt with by the Court as either of a *strict* or of a *directory* character: the former such as only arise under the exact circumstances prescribed by the settlement; the latter such as being merely monitory may be taken with a degree of latitude. Thus, where an advowson was vested in trustees upon trust to elect and present a fit person *within six months* from the incumbent's decease, it was considered that the clause was *directory*, and that the trustees might equally elect and present, although that period had elapsed (*f*). So, where six trustees were empowered *when reduced to three* to substitute others, and all died but one, it was held competent to the sole survivor to fill up the number (*g*).

[*601] * And where in the case of twenty-five trustees, the direction was, that *when reduced to fifteen* the survivors should nominate, it was determined by the Court that, although seventeen remained, the survivors were at *liberty* to exercise their power, but that, when reduced to only fifteen, they were *compellable* to do so (*a*).

6. **Charity.**—These were cases of *charitable* trusts, in which it seems a greater latitude of construction is allowed. But in another case, where the trusts were not charitable, and estates were devised to trustees upon trust to sell "with all convenient speed, and within *five years* after the testator's decease," it was held that these words were *directory* only, and that the trustees could sell and make a good title, although the five years had expired (*b*).

II. We proceed to consider the *construction* of powers. As the powers of trustees are regulated by the doctrines applicable to powers in general, and as the admirable treatise of Lord St. Leonards is in every one's hands, we shall advert only to some cases of most frequent occurrence.

(*f*) Attorney-General v. Scott, 1 Y. & C. C. C. 139; but see Foley v. Ves. 413, see 415. Wontner, 2 J. & W. 245.

(*g*) Attorney-General v. Floyer, 2 Vern. 748; and see Attorney-General v. Bishop of Lichfield, 5 Ves. 287; and see Cuff v. Hall, 1 Jur. 825; Attorney-General v. Cuming, 2 N. S. 973.

1. **Power to "A. and B. and their heirs."**—If a power be given to "A. and B. and *their heirs*," it is perfectly clear, that, although the limitation of an *estate* in such terms would so vest it in the grantees that they might convey it to a stranger, and the survivor devise it, the power is not to be construed as intended in like manner to be assignable and devisable (c).

Chief Justice Wilmot's opinion.—Upon the subject of such a power where it was given *personally*, and unaccompanied by any estate, to A. and B. and their heirs, Lord Chief Justice Wilmot observed, "It is asked What must become of the power upon the death of one of the trustees? It must be considered as a tenancy in common. Had the words been 'their several and respective heirs,' it would have been clear; and in common parlance, and according to the common apprehension of mankind, when an estate is given to two men and their heirs, no one not illumined with the legal nature of joint-tenancy could ever conceive the estate was to go to the heirs of the survivor. It is equivalent to saying, *With consent of both while they live; but when one dies, that consent shall devolve upon his heir; the heir of the dead trustee shall consent as well as the surviving trustee. One may abuse the power; I will supply the loss of one by his heir, and the loss of both by the heirs of both*" (d). But this was where A. and B. had a * mere power, for where A. and B. [*602] are trustees of an estate limited to them and their heirs, and the power constitutes an essential part of the trust, it will pass with the estate to the survivor (a).

Townsend v. Wilson.—In *Townsend v. Wilson* (b) a power of sale was given to *three trustees* to preserve contingent remainders *and their heirs*; and it was directed that the money to arise from the sale should be paid into the hands of the trustees *or the survivors or survivor of them*, and the executors, administrators, or assigns of such survivor, and there was a *power of appointment of new trustees*, with a

(c) *Cole v. Wade*, 16 Ves. 40, per Sir W. Grant.

(d) *Mansell v. Vaughan*, Wilm. 50, 51.

(a) See *infra*, p. 611.

(b) 1 B. & Ald. 608, 3 Mad. 261;

and see *Cooke v. Crawford*, 13 Sim. 91.

direction that such appointment should take place as often as any one or more of the trustees should die, &c. One of the trustees died, and it was determined by the Court of Queen's Bench, that the *survivors* alone were incapable of exercising the power. Lord Eldon was dissatisfied with this decision, and asked, "Did the Court of Queen's Bench consider that the two surviving trustees and *the heir of the deceased trustee*, were to act together? for it was one thing to say that the survivors could not act *until another was appointed*; and a different thing to say, *the heir of the deceased trustee* could act in the meantime" (c). But his Lordship so far bowed to the authority of the decision, that he refused under similar circumstances to compel a purchaser to accept the title (d). In *Townsend v. Wilson* the trustees had not the *fee*, and the power was not to be executed as part of a trusteeship, and it is therefore no authority against the execution of a *trust* by the surviving trustees. Indeed, where an estate was devised to three trustees and their *respective* heirs, upon trust that they and their *respective* heirs should sell, the word "respective" was rejected for surplusage, and it was held that the survivors could make a title (e).

2. *Hewett v. Hewett*. — In *Hewett v. Hewett* (f), a testator devised his estate to four persons to uses in strict settlement, with a power to the tenants for life, when in actual possession, to cut such trees as the *four devises to uses, or the survivors or survivor of them* (omitting the words "and the heirs of the survivor") should direct; and all the trustees being dead, the question was whether the power was gone. Lord Henley held, that, upon the construction of the will, the testator intended the power to be co-extensive with the life estates, and that the trustees were interposed, as supervisors only to prevent destruction; and that the office [*603] of the trustees was not personal, but such * as might be executed by the Court. He, therefore, considered

(c) *Hall v. Dewes*, Jac. 193; and see *Jones v. Price*, 11 Sim. 557.

(d) *Hall v. Dewes*, Jac. 189.

(e) *Jones v. Price*, 11 Sim. 557.

(f) 2 Eden, 332, Amb. 508; and see *Bennett v. Wyndham*, 23 Beav. 528.

the power as subsisting, and referred it to the Master to inquire what timber was fit to be cut. The Court, therefore, did not regard the authority to the trustees as a mere power, but as a trust.

3. **Power to "Trustee and his assigns."** — Where a discretionary *legal power* is expressly limited to "A. and his assigns," the grantee or devisee of A., and even a claimant under him by operation of law as an heir or executor, may exercise the power (*a*); but in a *trust*, if an estate be vested in a trustee upon trust that he, his heirs, executors, administrators or *assigns* shall sell, *etc.*, the introduction of the word *assigns* will not authorise the trustee to assign the estate to a stranger (*b*), nor, if the assignment be made, will the stranger be capable of exercising the power (*c*).

4. **Power given to a mortgagee.** — In a *mortgage*, with a power of sale limited to the mortgagee, his heirs, executors, administrators, and *assigns*, the intention is that the power should go along with, and be annexed to, the security; and therefore, if the mortgage be assigned to a stranger, and the legal estate be conveyed to the stranger or to a trustee for him, the stranger, alone or with the concurrence of the trustee, can give a good legal and equitable title (*d*); and even if a mortgage be made to A. and B. to secure a *joint* advance, and the power of sale and signing receipts be limited to A. and B., *their heirs and assigns*, it has been held that as the power and security were plainly meant to be coupled together, and the security enures to the benefit of the survivor (the advance being a joint one), the survivor may also sell (*e*).

5. **Power indicating personal confidence to "A. and his executors."** — If a *power* indicating personal confidence be given to a "trustee and his *executors*," and the executor of the trustee dies having appointed an executor, the latter executor, though by law the executor not only of his immediate testa-

(*a*) *How v. Whitfield*, 1 Vent. 338, 339; 1 Freem. 476.

(*b*) The case of *Hardwick v. Mynd*, 1 Anst. 109, cannot in this respect be supported.

(*c*) See p. 608.

(*d*) *Soloway v. Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594.

(*e*) *Hind v. Poole*, 1 K. & S. 383.

tor but also of the trustee, will not, it is said, be so considered for the purposes of the power (*f*); for a matter of personal confidence is not to be extended beyond the express words and clear intention of the settlor: and in this case, the settlor may have meant the power to be exercised exclusively by the executors, whom the trustee had himself named,

and not by a person who is executor of the trustee
[*604] *by operation of law only. This, however, is a

narrow construction, and the liberality of modern times may not improbably hold that, if a power be given to executors, the settlor must be taken to have contemplated generally every one whom the law invests with that character.

6. Power to "executors" "trustees."—A power limited to "executors" or "sons in law" may be exercised by the survivors so long as the plural number remains (*a*), and if a power be limited to a number of "trustees," we may reasonably conclude that, whether they have any estate or not—i.e. whether the power be an adjunct to the trust or collateral to it, it may be exercised by the surviving trustees. And a power given to "executors" will, if annexed to the executorship, be continued to the single survivor (*b*); and so a power given to "trustees" will, as annexed to the estate and office, be exercisable by the single survivor (*c*); but it cannot be exercised by one trustee in the lifetime of the other who has not effectually disclaimed (*d*). And it has been said that if a power to vary the rights of parties be communicated to the "*trustees for the time being*," it cannot be exercised by a single trustee (*e*). And where there was a trust for sale, but no sale was to be made without the consent of the testator's *sons and daughters*, and he left seven sons and daughters, and one died, it was held that a sale with the

(*f*) See *Cole v. Wade*, 16 Ves. 44; *Stile v. Tomson*, Dyer, 210, a; Perk. sect. 552; Moore, 61, pl. 172; Sugd. Powers, 129, 8th edit.

(*a*) Sugd. Powers, 128, 8th edit.

(*b*) Sugd. Powers, 128, 8th edit; *Houell v. Barnes*, Cro. Car. 382; *Brassey v. Chalmers*, 4 De G. M. &

G. 528, reversing the decision of the Master of the Rolls, 16 Beav. 231.

(*c*) *Lane v. Debenham*, 11 Hare, 188.

(*d*) *Lancashire v. Lancashire*, 2 Ph. 604.

(*e*) *Lancashire v. Lancashire*, 2 Ph. 604.

consent of the survivors was too doubtful a title to be specifically enforced (*f*).

7. Power to "trustees and survivors." — A discretionary power to four trustees "and the *survivors* of them," cannot, it seems, be executed by the last survivor (*g*); for though a power to trustees may, in general, be held to survive, an intention to the contrary may be fairly inferred: the settlor may be supposed to have said, "I repose a confidence in any two of the trustees jointly, but in neither one of them individually."

To "trustee and survivor." — But if a power be limited to four trustees "and the *survivor* of them," it may well be argued that, on the death of one, the power may still be exercised by the survivors; for there can be no valid reason why a person who trusted the four jointly, and each of them individually, should refuse to repose a confidence in the survivors for the time being (*h*).

* 8. *Trower v. Knightley*. — In a case before Sir J. [*605] Leach, a testator devised an estate to trustees upon trust as to one moiety for A. for life, remainder to her children at twenty-one, and as to the other moiety for B. for life, remainder to her children at twenty-one, and gave the trustees a power of sale "*during the continuance of the trust*." A. died, and her children attained twenty-one, and the question was whether the trustees could, under the power, sell the whole estate, the children of B. being infants. The Vice-Chancellor held, that if the children of A. could call for a present conveyance of their moiety it would have the effect of depriving B. and her children of the benefit of the power of sale, and also of the leasing power given to the trustees, for that an undivided moiety could not advantageously be sold or leased, and that the testator must have meant to continue the powers of owner-

(*f*) *Sykes v. Sheard*, 2 De G. J. & S. 6.

(*g*) *Hibbard v. Lamb*, Amb. 309. Note, further directions were declared necessary on the death of *either* of the surviving executors, see *Eaton v. Smith*, 2 Beav. 236.

(*h*) See *Crewe v. Dicken*, 4 Ves. 97; in which case it seems to have been assumed that the receipt of the survivors would be a sufficient discharge.

ship to the trustees until there were owners competent to deal with the whole estate (a).

9. Power "during the continuance of the trust." — But if a power be given to trustees to be exercised "during the continuance of the trust," it cannot be exercised after the time when the trust *ought* to have been completed, though, from the delay of the trustees it happens that the trust has not in fact been executed (b).

10. Powers cease when settlement is at an end. — And though the power be not confined expressly to the continuance of the trust, yet the power is gone when the objects of the trust have been fully exhausted, but not before (c).

[But the mere fact of the beneficial interest in the property having become vested in persons, all of whom are *sui juris*, will not put an end to the power, if, on the construction of the instrument creating the power, the intention appears that it should still be exercisable, and the power in its creation was not obnoxious to the rule against perpetuities (d).

Within what time power must be exercised. — If a power of sale be given in general terms, the question arises, within what limit of time it must be exercised. This will depend on the nature of the limitations contained in the will or settlement; for when, by reason of the expiration or cesser of the limitations, the absolute interests come into existence, the power is considered to be at an end. And as, for the settlement to be valid, the limitations must become [*606] absolute within the period allowed by the rule* against perpetuities, a power which is to continue in existence until the interests are absolute will also be valid. If the settlement contains in the first instance absolute limitations of interest, a power of sale given for the purpose of

(a) *Trower v. Knightley*, 6 Mad. 134; and see *Taite v. Swinstead*, 28 Beav. 525.

(b) *Wood v. White*, 2 Keen, 664. It was determined on appeal that the trusts in this case were still in being, 4 M. & Cr. 480.

(c) *Wolley v. Jenkins*, 23 Beav. 53; *Mortlock v. Buller*, 10 Ves. 315; *Wheate v. Hall*, 17 Ves. 86; *Lantabery v. Collier*, 2 K. & J. 709.

[(d) *Re Cotton's Trustees and the School Board for London*, 19 Ch. D. 624.]

division among the beneficiaries will not be invalid, but it must be exercised within a reasonable time (a).]

11. **Joint powers.** — Powers given to trustees must be exercised by them jointly, but an act by one trustee, with the sanction and approval of a co-trustee, will be deemed the act of both (b).

[12. **Contract for lease by tenant for life carried out.** —

Where a power of leasing was given to a legal tenant for life, and after his death to trustees, during the minority of a legal tenant in tail, and the tenant for life entered into a contract to grant a building lease but died before the lease was granted, it was held that the trustees had power to effectuate the contract of the tenant for life by executing a lease (c).]

13. **Moral considerations.** — Trustees in the exercise of their powers must act *bonâ fide* and impartially for the benefit of their *cestuis que trust* — i.e. the persons claiming under the settlement, and must not deviate from the terms of the trust from moral considerations, or seek to do what they may think right, if in excess of their trust (d).

III. Of the effect of *disclaimer*, *assignment* and *survivorship* of the estate.

First. Of disclaimer.

1. **Effect of disclaimer upon powers.** — If a power be given to several trustees, and one of them *disclaims* [the trust], the power may be exercised by the continuing trustees or trustee (e).

In *Hawkins v. Kemp* (f), a purchaser at first objected that the accepting trustees could not exercise the power, or not without the appointment of a new trustee in the place of the trustee who had disclaimed, but the point was afterwards

[(a) *Per* Jessel, M. R., *Peters v. Lewes, and East Grinstead Railway Company*, 18 Ch. D. 429; but see S. C. 16 Ch. D. 703.]

(b) *Messeena v. Carr*, 9 L. R. Eq. 260.

[(c) *Davis v. Harford*, 22 Ch. D. 128.]

(d) *Ellis v. Barker*, 7 L. R. Ch. App. 104.

(e) *Jenk. 44*; *Crewe v. Dicken*, 4 Ves. 97; *Earl Granville v. McNeile*, 7 Hare, 156; *White v. M'Dermott*, 7 I. R. C. L. 1.

(f) 3 East, 410.

abandoned by the purchaser's counsel as untenable. And the late Vice-Chancellor of England, in a subsequent case, observed: "I have always understood, ever since the point was decided in *Hawkins v. Kemp*, or rather was, as the judges said in that case, properly abandoned by the defendant's counsel as not capable of being contended for, that where two or more persons are appointed trustees, and all [*607] of *them, except one, renounce, the trust may be executed by that one" (a).

Adams v. Taunton.—*Adams v. Taunton* (b) is a direct decision by Sir J. Leach to the same effect. A testator had devised his estates to A. and B. upon trust to sell and apply the proceeds amongst his children, and declared that the receipts of the said A. and B. should be sufficient discharges. A. renounced, and Sir J. Leach, after having taken time to consult the authorities, said, "It being now settled that a devise to A., B., and C. upon trust is a good devise to such of the three as accept the trust, it follows by necessary construction that by the receipt of the trustees is to be intended the receipt of those who accept the trust" (c).

2. Powers to "trustees" or "executors."—If the power be not given to the trustees by *name*, but to the "trustees" or "executors"; it is *clear, à fortiori*, that if one disclaim the acting trustees or executors may exercise the power (d).

[3. By the Conveyancing Act, 1882, sect. 6, which applies to powers created by instruments coming into operation either before or after the commencement of the Act, "a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power; and after disclaimer shall not be capable of exercising or joining in the exercise of the power. On such disclaimer the power may be exercised by the other or others, or the survivors or

(a) *Cooke v. Crawford*, 13 Sim. 96.

(b) 5 Mad. 435; and see *Bayly v. Cumming*, 10 Ir. Eq. Rep. 410; *Cooke v. Crawford*, 13 Sim. 96; *Sands v. Nugee*, 8 Sim. 130.

(c) From his Honour's words, "the receipts of the trustees," it might be thought the power had been given, not to A. and B. by name, but

to "the trustees": the R. L. has been consulted, and it appears as stated in the report, that the power was given to "the said A. and B."

(d) *Worthington v. Evans*, 1 S. & S. 165; *Boyce v. Corbally*, L.L. & G. t. Plunket, 102; and see *Clarke v. Parker*, 19 Ves. 1; *White v. M'Dermott*, 7 I. R. C. L. 1.

survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power" (e). But this section does not authorise a trustee to disclaim a particular power so as to vest the exercise of it in his co-trustees while he continues a trustee for other purposes (f).

4. **Renunciation.**—It has been held in Ireland that the renunciation by one executor, by an instrument under seal, of the office of executor operates as a disclaimer under this section of powers annexed to the executorship (g).]

Secondly, Of assignment.

1. **Effect of assignment of the estate.**—The power is not appendant to the estate, so as to follow along with it in every transfer by the trustee, or devolution by course of law (a). But where the estate is duly transferred [*608] to persons regularly appointed trustees under a power in the settlement creating the trust, the transferees take the estate and the office together, and can exercise the power. Where the settlement contains no such power, it seems that the appointment of new trustees by the Court would not, but for recent Acts, communicate arbitrary or special discretionary powers (b), unless they were expressly (c) or in fair construction limited to the trustees for the time being (d). If powers be given to trustees, their heirs, executors, administrators, and assigns, and the Court appoints new trustees and makes a vesting order, the new trustees are duly constituted assigns, and may therefore be justly considered within the purview of the settlement. But assigns from a trustee *mero motu*, and without competent authority, would not be so considered.

[(e) 45 & 46 Vict. c. 39, s. 6.]

[(f) See *Re Eyre*, 49 L. T. N. S. 259.]

[(g) *Re Fisher and Haslett*, 13 L. R. Ir. 546.]

(a) *Cole v. Wade*, 16 Ves. 47, per Sir W. Grant; *Crewe v. Dicken*, 4 Ves. 97; *Re Burt's Estate*, 1 Drew. 319; *Wilson v. Bennett*, 5 De G. & Sm. 475. The case of *Hardwicke v. Mynd*, 1 Anst. 109, is an anomaly.

(b) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Fordyce v. Bridges*, 2 Ph. 497, see 510; *Newman v. Warner*, 1 Sim. N. S. 457; *Cooper v. Macdonald*, 35 Beav. 504; and see *Cole v. Wade*, 16 Ves. 44, 47; *Hibbard v. Lambe*, Amb. 309.

(c) *Bartley v. Bartley*, 3 Drew. 384; *Brassey v. Chalmers*, 4 De G. M. & G. 528.

(d) *Byam v. Byam*, 19 Beav. 66.

[2. 44 & 45 Vict. c. 41, s. 33. — By a recent enactment every trustee appointed by any Court of competent jurisdiction has as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, the same powers, authorities, and discretions, and may in all respects act as if he had been originally nominated a trustee by the instrument creating the trust; and this enactment applies to appointments made either before or after the commencement of the Act (e).]

3. **Release with intention of disclaiming.** — We have seen that if one trustee *disclaims* in the strict sense of the word, the power will not be extinguished, but will survive to the co-trustee; but, according to the old doctrine, if a trustee instead of *disclaiming* had *assigned* the estate, that was a virtual acceptance of the trust, and then the conveyance of the retiring trustee did not pass the power into the hands of the continuing trustee (f); but at the present day it seems a release with the intention of disclaimer would have all the operation of a formal and actual disclaimer (g).

4. **Whether the power will remain in the trustee after alienation of the estate.** — Though an assignment of the *estate* will not carry the *power* to the assignee, it does not follow [*609] that the power will remain in the *assignor, so as to be transmissible to his representative; for where it was the settlor's intention that the *estate and power should be coupled together*, the trustee, by severing the union through the alienation of the estate, may intercept the execution of the power by the representative. Thus [where, prior to the Conveyancing and Law of Property Act, 1881, an estate was] limited to A. and his heirs upon a trust to be executed by A. and his *heirs*, and A. in his lifetime conveyed away the estate, or devised it by his will, it was held that the heir of A. could not execute the power (a); for the heir was

[(e) 44 & 45 Vict. c. 41, s. 33. This section takes the place of the corresponding section in Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 27, which was repealed by 44 & 45 Vict. c. 41.]

(f) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Crew v. Dicken*, 4 Ves. 97.

(g) *Supra*, p. 193.

(a) *Wilson v. Bennett*, 5 De G. & Sm. 475; and see *Re Burt's Estate*, 1 Drew. 319.

no heir *quatenus* this estate; for it was not allowed to *descend*, but was aliened or devised away from the person who would have been heir; [and the same principle equally applies to a case falling under the recent Act, where if the estate be conveyed away by the trustee in his lifetime, so as not to vest in his personal representative, such representative cannot execute the power.]

5. **Case of real and personal estate coupled together.**— In *Cole v. Wade* (b), a testator gave the residue of his real and personal estate to Ruddell and Wade (whom he appointed his executors), their executors, administrators, and assigns, and directed *his said trustees and executors*, after making certain payments thereout, to convey and dispose of the said residue of his real and personal estate unto and amongst such of his relations and kindred in such proportions, manner and form, as *his said executors* should think proper, his intention being that everything relating to that disposition should be entirely at the discretion of the said *trustees and executors, and the heirs, executors and administrators of the survivor of them* (c). Wade, the survivor, devised and bequeathed the real and personal estate of the testator to William and Edward Bray, their heirs, executors, administrators and assigns, upon the trusts of the will, and named them his executors for that specific purpose only, appointing his wife and another person executors as to his own estates. The question was discussed, whether William and Edward Bray could exercise the power of distribution among the relations. Sir W. Grant said, “The original trustees and executors were the same persons; all the real and personal estate was vested equally in them; but the heirs and executors of the surviving trustee might be different persons; yet all the directions about the distribution of the residue proceed upon the supposition that the same persons are to select the objects and settle the proportions in which they are to take; but if the real estate is to go to one, * and the personal estate to another, [*610] the testator has left it entirely uncertain how the power is to be executed. Whether the Messrs. Bray can in

(b) 16 Ves. 27.

form of expression elsewhere in the

(c) The testator used this last will.

any sense be the executors of Wade, with whose own property they are not to intermeddle, it is not material to determine." His Honour, therefore, decided that the power had become extinguished.

6. **The estate may be severed from the powers.**—But the existence of a power annexed to a trust and forming an integral part of it does not depend on the continuance of the legal estate *per se* in the donee of the power, where there is no express declaration to the contrary; as, where a testator gave a sum of money to be invested in the funds in the names of the head of a college at Oxford, the junior bailiff of the city, and the elder churchwarden of a parish, the dividends to be applied to certain purposes as the trustees should approve, and the bailiff and churchwarden being *annual* officers, the investment as directed by the will would have been accompanied with frequent transfers of the stock, the Court ordered that the money should be invested in the names of two new trustees jointly with the head of the college, but that the objects of the charity should be nominated and approved in the manner pointed out by the will (a).

[7. **Release of powers under recent Act.**—By the Conveyancing and Law of Property Act, 1881, "a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise the power;" and that, whether the power was created by an instrument coming into operation before or after the commencement of the Act (b).

Does not apply to power coupled with a duty.—But it has been held that this does not apply to a power coupled with a duty; as to which Kay, J., observed, "a trustee who has a power coupled with a duty is bound, so long as he remains a trustee, to preserve that power, and to exercise his discretion as circumstances arise whether the power shall be used or not, and can no more by his own voluntary act destroy a power of that sort than he can voluntarily put an end to any other trust that may be committed to him" (c).]

(a) *Ex parte Blackburne*, 1 J. & W. 297; and see *Hibbard v. Lamb*, Amb. 309.

[(b) 44 & 45 Vict. c. 41, s. 52.]

[(c) *Re Eyre*, 49 L. T. N. S. 259.]

Thirdly. As to survivorship.

1. **Survivorship of powers.** — The survivorship of the *estate* carries with it the survivorship of such *powers* as are annexed to the trust. If a *mere* power be given to A., B., and C., and one of them die, it is perfectly clear that the power cannot be exercised by the survivors: but if trustees have an *equitable* power annexed to the trust, and forming an integral part of it, as if an estate be vested in three trustees upon trust * to sell, then, as the power [*611] is coupled with an interest, and the interest survives, the power also survives (a).

Trust powers. — The principle that *trust powers* survive with the *estate* appears to be as old as the time of Lord Coke, for he observes, "If a man *deviseth land to his executors to be sold*, and maketh two executors, and the one dieth, yet the survivor may sell the land, because as the *estate*, so the *trust* shall survive; and so note the diversity between a *bare trust* and a *trust coupled with an interest*" (b). At the present day a *trust*, that is, a *power imperative*, whether a bare power, or a power coupled with an interest, would be equally carried into execution in the *forum* of a Court of equity; for the maxim now is, The trust or power imperative is the estate. But in the time of Lord Coke, had a bare power been devised to A. and B. to sell an estate, as for payment of debts, the authority was one which A. and B. during their joint lives were compellable by *subpœna* in Chancery to execute for the benefit of the creditors; but if A. happened to die before the sale was carried into effect, the trust was extinguished, and the heir who had always retained a right to the intermediate rents and profits was then seised of the absolute and indefeasible inheritance. But in case the testator had *devised the estate* to A. and B. to sell for payment of debts, then, as the trust was not a mere power, but a power coupled with an interest, it received a more

(a) *Lane v. Debenham*, 11 Hare, 188; and see *Gouldsb.* 2, pl. 4; *Peyton v. Bury*, 2 P. W. 628; *Mansell v. Vaughan*, Wilm. 49; *Eyre v. Countess of Shaftesbury*, 2 P. W. 108, 121, 124; *Butler v. Bray*, Dyer, 189, b; *Byam v. Byam*, 19 Beav. 58; Jenk. 44; Co. Lit. 112, b. 113, a; *Flanders v. Clark*, 1 Ves. 9; *Potter v. Chapman*, Amb. 100; *Jones v. Price*, 11 Sim. 557.

(b) Co. Lit. 113, a; and see *Ib.* 181, b.

liberal construction, and as upon the death of A. the whole estate passed by survivorship to B., the power being annexed to the estate, was held to survive with it (1).

[*612] * 2. Survivorship where the power is given to trustees by name. — A distinction may perhaps be thought

(1) In examining the cases of powers before the Statute of Uses, the following points may be usefully noticed.

1. Before Statute of Uses a power given by will over the legal estate was void. — A person seized of the legal estate of lands could not, before the Statute of Wills, have devised them directly, and therefore he could not have gained his object indirectly by means of a power: had a testator devised that A. and B. should sell his estate, the authority was void.

2. But over the use was good. — But a use was devisable, and therefore, if *cestui que use* had devised the lands to a stranger, though the legal estate did not pass (the Statute of Richard the Third, which made mention of feoffments and grants, not extending to wills), the devisee might still have sued his *subpœna* in Chancery, and have compelled the feoffees to execute a conveyance of the estate.

3. The execution of the power over the use passed the legal estate. — If *cestui que use* had devised that A. and B. should sell, and A. and B. in pursuance of the authority had made a feoffment or grant, this assurance seems to have operated retrospectively as the assurance of the testator, and so, falling within the words of the Statute of Richard, served to pass even the legal estate.

4. The power might be vested in the feoffees. — And *cestui que use* might have devised such an authority even to his feoffees, and the power would have been construed in the same manner as if it had been devised to a stranger. Thus where a man enfeoffed A. and B. to his own use, and afterwards devised that the said A. and B. should sell the estate and apply the proceeds, &c., and A. and B., on the decease of the testator, enfeoffed C. and D. to the like uses, it was ruled that A. and B. might still sell under the power, although they had parted with the legal fee.

5. Until the power was executed the feoffees were trustees for the heir. — Until the sale was effected, the feoffees were trustees for the testator's heir, and were bound to account to him for the accruing rents and profits; and if the power which, whether given to a stranger or to the feoffees, was construed as a naked authority, became extinguished by any means, as by the death of the donees of the power, the heir was as absolutely entitled to the use in fee, as if no will had been made.

6. The object of the power could have compelled the execution. — So long as the power subsisted, the person who would suffer by the extinguishment of the power might have compelled the donees, by filing a bill in Chancery, to execute the power.

7. If no specific object of the power, the execution was optional. — But if the proceeds of the sale were to be distributed in *pious usus*, as no one could plead a personal loss by the non-execution of the power, there was no one to sue a *subpœna*, and the donees of the power were left to the arbitrary exercise of their own discretion. See case *temp. H. 7. Treat. of Powers*, Appendix No. 1, 6th edit.

to exist between cases where the language of the trust is indefinite as to the persons by whom it is to be exercised (for example, where an estate is vested in trustees and their heirs *in trust to sell, &c.*), and those cases where the estate is limited to *persons by name*, as upon trust that "the said A. and B.," or that "the *said* trustees" (which is equivalent to naming them), shall sell; but the Courts have never relied upon any distinction of the kind, and it seems to be now decided that even where the trust is reposed in the trustees by name, the survivor, who takes the estate with a duty annexed to it, can execute the trust (*a*); and the *rule* of survivorship applies not only to trusts, or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are meant to form an integral part of it (*b*).

3. *Powers not annexed to the trust.*—But powers which are purely *arbitrary*, and independent of the trust, and not intended in furtherance of the trust, must, it is conceived, be construed strictly, and be governed by the rules applicable to ordinary powers. If, for instance, the trustees by name have a power of revoking the limitations, and shifting the property into a different channel, this discretion is evidently meant to be personal, and not to be annexed to the estate or office (*c*).

[4. *Recent Act.*—Now, as to executorships and trusts constituted after or created by instruments coming into operation after the 31st December, 1881, a power or trust given to or vested in two or more executors or trustees jointly, may, in the absence of a contrary intention expressed in the instrument creating the power or trust, be exercised or performed by the survivor or survivors of them for the time *being (*a*). But it is conceived [*613] that this section does not apply to a purely arbitrary and personal power given to trustees *nominatim*.]

(*a*) *Lane v. Debenham*, 11 Hare, 188; *Hall v. May*, 3 K. & J. 585; [*Re Cooke's Contract*, 4 Ch. D. 454.]

(*c*) See *Lane v. Debenham*, 11 Hare, 192.

[(*a*) 44 & 45 Vict. c. 41, s. 38.]

(*b*) *Warburton v. Sandys*, 14 Sim. 622.

IV. Of the *control of the Court* over the exercise of powers.

1. **Control of the Court over arbitrary powers.**—Where a power is given to trustees to do, or not do, a particular thing at their discretion, the Court has no jurisdiction to lay a command or prohibition upon the trustees as to the exercise of that power, provided their conduct be *bond fide*, and their determination is not influenced by improper motives (*b*).

Pink v. De Thuissey.—Thus, in *Pink v. De Thuissey* (*c*), a testatrix gave 1000*l.* to A. upon a condition precedent, but left “her executor *at liberty* to give the said sum if he found the thing proper” though the condition should not have been performed. A. died without having fulfilled the condition or received the money, and his personal representative filed a bill against the executor of the testatrix to compel payment of the legacy. A. in his lifetime had applied for the money, but the executor had not thought right to comply with the request. Sir T. Plumer, in dismissing the bill, observed, “The executor says *he did not think proper to advance the legacy*: is the Court to decide upon the propriety of the executor’s withholding the legacy? That would be assuming an authority confided by the will to the discretion of the executor: it would be to *make* a will for the testatrix, instead of *expounding* it.”

2. **Power with a duty.**—But where the power is *accompanied with a duty* and meant to be exercised (as a power of leasing), the Court will compel the execution or execute it

(*b*) *Thomas v. Dering*, 1 Keen, 729; *Re Eddowes*, 1 Dr. & Sm. 395; *Talbot v. Marshfield*, 2 Dr. & Sm. 285; *French v. Davidson*, 3 Mad. 396; *Sillibourne v. Newport*, 1 K. & J. 602; *Walker v. Walker*, 5 Mad. 424; *Bankes v. Le Despencer*, 11 Sim. 527, *per* Sir L. Shadwell; *Attorney-General v. Governors of Harrow School*, 2 Ves. 551; *Cowley v. Hartstonge*, 1 Dow, 378, *per* Lord Eldon; *Potter v. Chapman*, Amb. 99, *per* Lord Hardwicke; *Carr v. Bedford*, 2 Ch. Rep. 146; *Wain v. Earl of Egmont*, 3 M. & K.

445; *Livesey v. Harding*, Tambl. 460; *Collins v. Vining*, C. P. Coop. Rep. 1837–38, 472; *Kekewich v. Marker*, 3 Mac. & G. 326, *per* Lord Truro; *Re Coe’s Trust*, 4 K. & J. 199; *Brophy v. Bellamy*, 8 L. R. Ch. App. 798; [*Gisborne v. Gisborne*, 2 App. Cas. 300; *Tabor v. Brooks*, 10 Ch. D. 273; *Marquis Camden v. Murray*, 16 Ch. D. 161; *Tempest v. Lord Camoys*, 21 Ch. D. 571; *Thomas v. Williams*, 24 Ch. D. 558.]

(*c*) 2 Mad. 157.

in the place of the trustees (*d*). So where the trustees had a power of sale, "if they should consider it advisable, but not otherwise," it was held that the power, though discretionary in form, was given to the trustees for the purposes of the will, and if those purposes could not be effected without the exercise of the power, they were bound to exercise it (*e*).

*** 3. Where trustees are required to do an act. — [*614]**

The Court will not in general control the discretion of trustees in reference to the adoption of any particular species of investment (*a*). But where trustees were "authorized and *required*," with the consent and *direction* of the tenant for life, to invest in leaseholds, the clause was held to be imperative upon the tenant for life's demand, and the trustees were not even allowed to say that the leaseholds would impose personal liabilities upon themselves, for by being parties to the settlement they had engaged to do it (*b*). But where the trustees were *required* to lend money to the husband on his bond, and he took the benefit of the Insolvent Debtors Act, it was held that, under such altered circumstances, the trustees were justified in refusing a loan to the husband (*c*); and where a variation of securities was to be with the consent of the tenant for life, and the fund was in danger, the Court called in the fund, though the consent of the tenant for life was refused (*d*).

[4. Maintenance of lunatic. — Where property was held upon trust to pay the income in such a way, at such time, and in such manner, as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was held that the trustees had no such discretion as would oust the jurisdiction of the Court, to apply the income in the

(*d*) *Tempest v. Lord Camoys*, 21 Ch. D. 576, note.

(*e*) *Nickisson v. Cockill*, 3 De G. J. & S. 622; 2 New Rep. 557.

(*a*) *Lee v. Young*, 2 Y. & C. C. C. 532.

(*b*) *Beauclerk v. Ashburnham*, 8 Beav. 322; *Cadogan v. Earl of Essex*, 2 Drew. 227.

(*c*) *Boss v. Godsall*, 1 Y. & C. C. C. 617.

(*d*) *Costello v. O'Rorke*, 3 I. R. Eq. 172.

lunatic's maintenance in exoneration of her absolute property (e).]

5. *Maintenance of infants.*—If a fund be applicable to the *maintenance of children* at the discretion of trustees, the Court will not take upon itself to regulate the maintenance, but will leave it to the trustees (f). [But the discretion must be exercised within the limits of a sound and honest execution of the trust (g); and where the Court was of opinion that the exercise of the discretion had not been proper, it set it aside and regulated the maintenance irrespective of the wishes of the trustees (h). But the Court has no jurisdiction on a summons for maintenance intitled only “in the matter of the infant” to control the discretion of the trustees which can only be done in an action or on an originating summons to which the trustees are made parties.¹

6. Where trustees are guardians of infants, and one guardian pays the income to the other guardian for the maintenance and education of the infants, he will not be discharged by such payment, but must show that the infants [*615] have been properly maintained and *educated, and that the amount paid to the other guardian was a proper allowance for the purpose (a).]

7. *Mode of execution of trust.*—Where a fund is bequeathed to executors or trustees upon trust to distribute among the testator's relations, or apply the fund to any other specific purpose *in such manner as the executors or trustees may think fit*, the executors or trustees, if willing to execute the trust, will not, even on a suit being instituted for carrying the trusts into execution, be deprived of their discretionary power, but may propose a scheme before the judge in chambers for the approbation of the Court (b).

[(e) *Re Weaver*, 21 Ch. D. 615.]

Hare, 410; *Davey v. Ward*, 7 Ch. D. 754.]

(f) *Livesey v. Harding*, Taml. 460; *Collins v. Vining*, C. P. Coop. Rep. 1837-38, 472; *Brophy v. Belamy*, 8 L. R. Ch. App. 798.

[(h) *Davey v. Ward*, 7 Ch. D. 754; *Re Roper's Trusts*, 11 Ch. D. 272.]

[(a) *Re Evans*, 26 Ch. D. 58.]

[(g) *Costabadie v. Costabadie*, 6

(b) *Brunsdon v. Woolredge*, Amb.

¹ *Re Lofthouse*, 29 Ch. Div. 921.

8. **Power as to the objects of the trust.**—Where the *objects* of a charity are from time to time to be at the discretion of the trustees (as if annual sums be made distributable *either* to private individuals *or* public institutions, *as the trustees may think fit*), the Court will not even order a scheme to be proposed, but will leave the trustees to the free exercise of their power with liberty for all parties to apply (c).

9. **Selection of particular objects.**—So where trustees had a power of selecting a lad for education from certain parishes, and if there were no suitable candidate, then from any other parish, and the trustees upon consideration rejected the candidate from the specified parishes, and selected a lad from another parish, it was held that the Court could not control the discretion. The trustees had assigned no reason for their choice, but that the Court said was not necessary, and in many cases would not be proper (d).

10. **Reasons for exercise of the power.**—But though trustees invested with a discretionary power are not bound to assign their reasons for the way in which they exercise it; yet, if they do state their reasons, and it thereby appears that the trustees were labouring under an error, the Court will set aside the conclusion to which they came upon such false premises (e).

11. **Powers not to be exercised nunc pro tunc.**—Where trustees have a discretionary power they must exercise their judgment according to the *circumstances as they exist at the time*, and they cannot, therefore, anticipate the arrival of the proper period by affecting to release it or by pledging themselves beforehand as to the mode in which the power shall be executed *in futuro* (f).

*[12. **Exercise of the power by will.**—Where a [*616] trustee had an absolute discretion to apply the trust

507; *Bennett v. Honeywood*, Id. 708;
Mahon v. Savage, 1 Sch. & Lef. 111;
Supple v. Lawson, Amb. 729, &c.

(c) *Waldo v. Caley*, 16 Ves. 206;
Horde v. Earl of Suffolk, 2 M. & K.
 59; and see *Powerscourt v. Powers-*
court, 1 Moll. 616; *Holmes v. Penney*
 3 K. & J. 103.

(d) *Re Beloved Wilkes's Charity*,
 3 Mac. & G. 440.

(e) *Ib.* 3 Mac. & G. 448; *King v.*
Archbishop of Canterbury, 15 East.
 117.

(f) *Weller v. Ker*, 1 L. R. Sc.
 App. 11; [*Moore v. Clench*, 1 Ch. D.
 447, 453; *Chambers v. Smith*, 3 App.

funds for certain charitable purposes as he might think fit, and he died without exercising the power by act *inter vivos*, but by his will gave definite directions as to the application of the funds, it was held that the power was duly exercised (a).]

13. **Fraud.**— There is sufficient ground for the interference of the Court, wherever the exercise of the discretion by the trustees is infected with fraud (b), or misbehaviour (c), or they decline to undertake the duty of exercising the discretion (d); or generally where the discretion is *mischievously and ruinously* exercised, as if a trustee be authorised to lay out money upon Government, or real or personal security, and the trust fund is outstanding upon any *hazardous* security (e). [But where the course pursued by the trustees is within the letter of the power, the *onus* is on the persons challenging their conduct to show that their discretion has been mischievously, or ruinously, or fraudulently exercised (f).]

14. **Powers in case of charity.**— And where the trustees of a *charity* were empowered to lease for three lives or thirty-one years, the Court expressed an opinion that the discretion might be controlled, if it appeared for the benefit of the charity that such a power should not be acted upon (g).

Cas. 795, 815; *Oceanic Steam Navigation Company v. Sutherland*, 16 Ch. D. 236;] and see *Thacker v. Key*, 8 L. R. Eq. 408.

[(a) *Copinger v. Crehane*, 11 I. R. Eq. 429.]

(b) *Attorney-General v. Governors of Harrow School*, 2 Ves. 552, per Lord Hardwicke; *Potter v. Chapman*, Amb. 99, per eundem; *Richardson v. Chapman*, 7 B. P. C. 318; *French v. Davidson*, 3 Mad. 402, per Sir J. Leach; *Talbot v. Marshfield*, 4 L. R. Eq. 661; and on appeal, 3 L. R. Ch. App. 622; *Thacker v. Key*, 8 L. R. Eq. 408.

(c) *Maddison v. Andrew*, 1 Ves. 59, per Lord Hardwicke; *Attorney-General v. Glegg*, Amb. 585, per eundem; *Willis v. Childe*, 18 Beav. 117; and see *Re Beloved Wilkes's Charity*,

3 Mac. & G. 440; and see *Byam v. Byam*, 19 Beav. 65.

(d) *Gude v. Worthington*, 3 De G. & Sm. 389. This was apparently the ground on which the case was decided, but the refusal of the trustees to act does not sufficiently appear on the report. And see *Mortimer v. Watts*, 14 Beav. 622; *Re Sanderson's Trust*, 3 K. & J. 497; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Palmer v. Newell*, 25 L. T. N. S. 892; *Bennett v. Wyndham*, 23 Beav. 528; *Gray v. Gray*, 11 Ir. Ch. Rep. 218, 13 Ir. Ch. Rep. 404.

(e) *De Manneville v. Crompton*, 1 V. & B. 359; *Costello v. O'Rorke*, 3 I. R. Eq. 172; and see *Lee v. Young*, 2 Y. & C. C. C. 532.

[(f) *Re Brittlebank*, 30 W. R. 99.]

(g) *Ex parte Berkhamstead Free School*, 2 V. & B. 138.

15. **The Court will exercise a surveillance where the trustees are before it.** — Where proceedings had been taken for controlling the discretion of the trustees, Lord Hardwicke said, “though he could not contradict the intent of the donor, which was to leave it in the discretion of the trustees, yet he would not dismiss the information but would still *keep a hand over them*” (*h*).

*16. **After decree trustee cannot exercise even a [*617] special power without the sanction of the Court.** —

Where a suit has been instituted for the administration of the trust, *and a decree has been made, that* attracts the Court’s jurisdiction, and the trustee cannot afterwards exercise the power without the concurrent sanction of the Court: as if a trustee have a power of investment he cannot make any investment without the approval of the Court (*a*); or if a trustee have a power of appointment of new trustees, he is not excluded from the right of nominating the person, but the Court must give its sanction to the choice (*b*); [and if the Court does not approve the nominee of the trustee it will call upon the trustee to make a new nomination, and will not appoint a person not nominated by the trustee merely on the ground that the nominee was not approved. Nor will the Court appoint a person not nominated by the trustee on the mere ground of such person being more eligible than the nominee of the trustee (*c*).

Effect of Order 55. — Where an action was commenced by suit for the general execution of the trusts of a will, and an order was made under Ord. 55, R. 3, directing certain inquiries, including an inquiry whether new trustees had been appointed, and whether any and what steps ought to be taken for the appointment of new trustees, and pending the inquiry the surviving trustee appointed a new trustee

(*h*) *Attorney-General v. Governors of Harrow School*, 2 Ves. 551.

(*a*) *Bethell v. Abraham*, 17 L. R. Eq. 24.

(*b*) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; — *v. Roberts*, 1 J. & W. 251; *Middleton v. Reay*, 7 Hare, 106; *Kennedy v. Turnley*, 6 Ir. Eq. Rep. 399; *Consterdine v. Consterdine*,

81 Beav. 333; *Gray v. Gray*, 13 Ir. Ch. Rep. 404; [*Minors v. Battison*, 1 App. Cas. 428; *Tempest v. Lord Camoys*, 21 Ch. D. 571; *Re Norris*, 27 Ch. D. 333; *Cecil v. Langdon*, 28 Ch. D. 1; *Re Hall*, 51 L. T. N. S. 901.]

[(*c*) *Re Gadd*, 23 Ch. D. 134, and see *Middleton v. Reay*, *ubi supra*.]

under the powers of the Conveyancing and Law of Property Act, 1881, it was held, that by the order the powers of the trustee were not interfered with, except so far as the exercise of them must necessarily clash with the particular inquiries directed; that it was the duty of the trustee not to fill up the vacancies in the trusteeship without the approval of the Court; and that the proper course would have been for the trustee to apply in chambers, stating that he intended to appoint the new trustee, and if it was found that there was no objection to the appointment it would have been approved (*d*).]

17. *Acts before decree.*—But if *no decree has been made*, then, as the plaintiff may abandon his suit at any moment, the trustee must not assume that a decree will be made, but must proceed in all necessary matters with the due execution of the trust (*e*). It would not be prudent, however, except in formal matters, to act without first consulting [*618] * the Court. It was held in one case, that the trustees had not exceeded their duty by appointing new trustees after the filing of a bill, as no extra costs had been thereby occasioned (*a*); but in another case it was said that the trustees ought, under the difficulties in which they were placed, to have consulted the Court, and as, instead of so doing, they had acted independently and made an appointment, which, though they entered into evidence they could not justify, and great extra costs had arisen out of their conduct, the extra costs which had been occasioned were thrown upon the trustees personally (*b*).

18. *Lord St. Leonards' Act.*—In dealing with the subject of the powers of trustees we should call attention to the important enactment, 22 & 23 Vict. c. 35, s. 30, by which trustees [were authorised to] apply by *petition* to any judge

[(*d*) *Re Hall*, 51 L. T. N. S. 901; 54 L. J. N. S. Ch. 527.]

(*e*) See *Williams on Executors*, 891, 4th ed.

(*a*) *Cafe v. Bent*, 3 Hare, 245; [*Thomas v. Williams*, 24 Ch. D. 558, 567].

(*b*) *Attorney-General v. Clack*, 1 Beav. 467; and see *Turner v. Turner*, 30 Beav. 414; *Talbot v. Marshfield*, 4 L. R. Eq. 661, 3 L. R. Ch. App. 622; *Bethell v. Abraham*, 17 L. R. Eq. 24.

of the Court of Chancery (*c*), or by a *summons* upon a *written statement* to any such judge at chambers for the opinion or direction of such judge respecting the management or administration of the trust property.

19. **Amendment Act.**—By the Amendment Act, 23 & 24 Vict. c. 38, s. 9, the petition or statement is required to be *signed by counsel*, and the judge may require the attendance of counsel either in chambers or in court (*d*).

20. **Affidavits not allowed.**—In proceedings under this enactment there is no investigation of the facts, but the correctness of the petition or statement is assumed, and if there be any *suggestio falsi* or *suppressio veri* the order of the Court *pro tanto* is no indemnity to the trustee. No affidavits, therefore, ought to be filed, and the costs of them would be disallowed (*e*).

21. **Jurisdiction.**—The Court has jurisdiction in England, though one of the trustees be resident in Ireland (*f*).

22. **Parties to be served.**—What parties are to be served is in the discretion of the *judge, and V. C. [*619] Wood was of opinion that the proper course was not to serve the petition on any one in the first instance, but to apply at chambers for a direction as to the persons to be served (*a*), and V. C. Malins thought the question of service ought to be dealt with at the hearing of the petition (*b*). But V. C. Kindersley said he would never allow a petition under the Act to be brought on for the purpose of ascertaining who were to be served; and that the petitioners must serve such persons as they thought proper, and state in the note at the end whom they had served, and that the V. C.

[(*c*) These applications should now be made to the Chancery Division of the High Court of Justice; see 36 & 37 Vict. c. 66, s. 34.]

(*d*) See observations of V. C. Stuart in *Re Dennis*, 5 Jur. N. S. 1388, which may have led to this additional enactment. For the practice under the Act, see [Rules of the Supreme Court, 1883, Order 52, R. 19–22, Order 65, R. 26. Notwithstanding the Judicature Act, 1873, and Order 19, R. 4, of the Rules of the Supreme

Court, 1883, signature of counsel is still necessary, *Re Boulton's Trusts*, 51 L. J. N. S. Ch. 493.]

(*e*) *Re Muggeridge's Trust*, Johns. 625; *Re Mockett's Will*, Ib. 628; *Re Barrington's Settlement*, 1 J. & H. 142.

(*f*) *Re French's Trusts*, 15 L. R. Eq. 68.

(*a*) *Re Muggeridge's Trust*, Johns. 625.

(*b*) *Re Cook's Trust*, W. N. 1873. p. 49.

and the other judges had agreed upon that course (c). On a petition by the trustees where the beneficiaries were infants absolutely entitled, it was held that the *infants* need not be served (d). And on a petition by trustees for the opinion of the Court as to the propriety of certain proposed *investments*, it was held that no one need be served (e). And so the Court dispensed with service on any party, where the question submitted to the Court by trustees was, whether they could make an *advancement* to a child out of a share to which the child was presumptively entitled (f).

23. **No appeal, &c.** — As the Act does not give any *right of appeal*, it was not intended to authorise adjudications upon nice questions of law (g). The object of the Act was to procure for trustees at a small expense the assistance of the Court upon points of minor importance arising in the management of the trust. Thus the Court, upon the petition of the trustees of a fund for the separate use of a *married woman, a lunatic* not so found by inquisition, has sanctioned the payment of the annual produce to the husband, he undertaking to apply the same for the benefit of his wife and family (h). So the Court will advise trustees as to *investment* of trust funds, *payment of debts or legacies*, &c. (i); and whether trustees of a remainder can with propriety *concur* with the owner of the particular estate *in the sale* of the fee simple (j); and whether trustees can properly grant a lease upon certain terms (k); exercise a *power of* [*620] *sale* (l); or a power of maintenance or ** advancement* under the circumstances stated (a); and whether *calls on shares* in companies should be borne by the testator's

(c) *Re Green's Trust*, 6 Jur. N. S. 530.

(d) *Re Tuck's Trusts*, W. N. 1865, p. 15.

(e) *Re French's Trusts*, 15 L. R. Eq. 68.

(f) *Re Larken's Trust*, W. N. 1872, p. 85.

(g) *Re Mockett's Will*, Johns. 628.

(h) *Re Spiller*, 6 Jur. N. S. 386; [*Re T* — 15 Ch. D. 78.]

(i) *Re Lorenz's Settlement*, 1 Dr. & Sm. 401; *Re Knowles's Settlement*

Trust, W. N. 1868, p. 233; *Re Murray's Trusts*, W. N. 1868, p. 195; *Re Tuck's Trusts*, W. N. 1869, p. 15.

(j) *Earl Poulett v. Hood*, 5 L. R. Eq. 116.

(k) *Re Lee's Trusts*, W. N. 1875, p. 61.

(l) *Re Stone's Settlement*, W. N. 1874, p. 4.

(a) *Re Kershaw's Trusts*, 6 L. R. Eq. 322; *Re Breed's Will*, 1 Ch. D. 226.

general estate or the legatees (*b*), &c. But the Court will not give an opinion under the Act upon matters of detail which cannot be properly dealt with without the superintendence of the Court and the assistance of affidavits, such as the laying out a particular sum on *improvements* (*c*); nor will the Court adjudicate upon *doubtful points*, the decision of which would materially affect the rights of the parties interested (*d*).

[24. **Order 55.**— We should also call attention to the Rules of the Supreme Court, 1883, Order 55, Rule 3, under which an originating summons may be taken out in the Chambers of a Judge of the Chancery Division for directing executors, administrators, or trustees, to do or abstain from doing any particular act in their character as such executors, or administrators, or trustees; but this Rule applies only to matters within the trust, and the Court refused to make an order under it, directing trustees to concur in a sale of property in a partition action (*e*). Under this Order directions have been given for an advance by the trustees to the tenant for life for the purpose of stocking and taking a farm subject to the trust, for which a tenant could not be found (*f*). By Rule 12, the issue of the summons is not to interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought; and an order made upon such a summons will not interfere with the powers or discretions, except so far as they necessarily clash with the directions of the order (*g*).

25. **Questions under Settled Land Act.**— If any question arises, or doubt is entertained, respecting any matter within sect. 56 of the Settled Land Act, 1882, being the section which saves powers of the tenant for life, or trustees under a settlement, which are concurrent with those under the

(*b*) *Re Box*, 1 H. & M. 522.

[(*e*) *Suffolk v. Lawrence*, 32 W.

(*c*) *Re Barrington's Settlement*, 1 J. & H. 142.

R. 890.]

[(*f*) *Re Household*, 27 Ch. D.

(*d*) *Re Lorenz's Settlement*, 1 Dr.

554.]

& Sm. 401; *Re Hooper's Will*, 29

[(*g*) *Re Hall*, 51 L. T. N. S. 901;

Beav. 656; *Re Evans*, 30 Beav. 232;

54 L. J. N. S. Ch. 527.]

Re Bunnell, 10 Jur. N. S. 1098.

Act, and restricts the exercise by trustees of such powers to the extent to be presently pointed out, the Court may on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon (*h*).

The application should be by summons to be served [*621] upon the *tenant for life, if not the applicant. But except the judge otherwise direct, no person except the tenant for life need be served in any case (*a*).

V. Of the restrictions on the powers of trustees imposed by the Settled Land Acts.

1. **Powers under Settled Land Act cumulative.**—The Settled Land Act, 1882, vests in the tenant for life, including any other limited owner to whom under sect. 58 the powers of a tenant for life are given, large powers of dealing with the settled land (*b*), which powers cannot be released, or defeated, or avoided, either by the tenant for life or the settlor; but by sect. 56, nothing in the Act is to take away, abridge, or prejudicially affect, any power for the time being subsisting under a settlement, or by statute, or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction or otherwise; and the powers given by the Act are cumulative. The effect of this enactment is not to take away from the trustees named in any settlement the powers given to them by that settlement, but to leave those powers exercisable concurrently with the powers created by the Act (*c*).

Consent of tenant for life to exercise of powers.—To obviate, however, the difficulty which might arise from the existence of concurrent powers, and in order to give full effect to the powers given by the Act to the tenant for life, the section provides that, (2) in case of conflict between the provisions of a settlement and the provisions of the Act, relative to any matter in respect whereof the tenant for

[(*h*) 45 & 46 Vict. c. 38, s. 56, (3).] term Settled Land, see sect. 2 of the

[(*a*) Settled Land Act Rules 1882, Act.]

R. R. 4, 5.]

[(*c*) *Re Duke of Newcastle's Estates* 24 Ch. D. 129.]

[(*b*) As to what is included in the

life exercises or contracts, or intends to exercise any power under the Act, the provisions of the Act are to prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life is, by virtue of the Act, to be necessary to the exercise by the trustees of the settlement or other person, of any power conferred by the settlement exercisable for any purpose provided for in the Act.

The wording of this clause has given rise to some difficulty, but it has been interpreted by Pearson, J. by treating the first part of the clause as relating to concurrent powers in the tenant for life; in which case, if the powers under the settlement are less beneficial to him than those under the Act, he is entitled to exercise the powers under the Act notwithstanding any restriction in the settlement. The latter part of the clause, however, relates to the case of * concurrent powers in the trustees of the settle- [*622] ment, or some other person under the settlement, and in the tenant for life, and requires the consent of the tenant for life to the exercise of the powers in addition to the requirements of the settlement (a). Where the tenant for life is capable of exercising his powers, the Court will not, even though he be a bankrupt, make an order under the *Settled Estates Act*, giving general powers of sale or of leasing to any other person, but if the tenant for life wrongfully refuse to exercise his powers, so as to prevent obvious and practicable improvements from being effected, and the persons interested come before the Court with a well considered scheme, and show that it is for the benefit of the estate that some particular lease should be granted, and that the tenant for life without sufficient reason refuses to exercise his power, the Court will make an order under the *Settled Estates Act* (b).

Settled Estates Act. — Powers already given by an order of the Court under the *Settled Estates Act* are not affected by sect. 56, and the proper course, if it is desired to super-

[(a) *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

[(b) *Re Mansel's Settled Estates*, W. N. 1884, p. 209.]

sede them, is to apply under the Settled Estates Act for that purpose (c).

2. It may be observed that the powers of the trustees, for the exercise of which the consent of the tenant for life is required, are those *conferred by the settlement*, the enactment does not touch general powers exercisable by the trustees *virtute officii*.

3. The effect of the enactment stated shortly is that any special power given to trustees for any of the purposes for which similar powers are given by the Settled Land Act to the tenant for life cannot be exercised without his concurrence.

4. **Consent of all tenants for life in possession required by Act of 1882.**—By the definition of a tenant for life it is provided that if, in any case, there are two or more persons entitled for life to possession of settled land as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act. And by sect. 58, the limited owners therein specified are to have the powers of a tenant for life, and the provisions of the Act referring to a tenant for life are to extend to each of such limited owners, and reading these provisions with the 56th section, it resulted that where several persons were concurrently entitled as tenants for life, or as such limited owners, in possession to the income of the settled land, the consent of all of them was necessary to the exercise by the trustees of the powers affected by the section.

Consent of one sufficient under Act of 1884.—This [*623] was found in practice to lead * to useless delay and expense, and to remedy the evil it was enacted by the Settled Land Act, 1884 (a), that where two or more persons together constitute the tenant for life for the purposes of the Settled Land Act, 1882, then, notwithstanding anything contained in sub-sect. (2) of sect. 56 of that Act, requiring the consent of all those persons, the consent of one only of

[(c) *Re Poole's Settlement*, 32 W. Haden's Settled Estates, 32 W. R. R. 956; 50 L. T. N. S. 585. *Re Barra-* 194.]

[(a) 47 & 48 Vict. c. 18, s. 6 (2).]

those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act. And the section applies to dealings as well before as after the passing of the Act.

As the law, therefore, now stands the trustees can exercise their powers if the concurrence of the tenant for life, or limited owner in possession, of any share of the settled property can be procured.

5. **Case of trust for sale or direction to sell.**—Hitherto we have been considering the case where there is no trust for sale, or imperative direction to the trustees to sell. Where, however, there is such a trust or direction the case falls within sect. 63 of the Act of 1882, and the right of the trustees to exercise their powers for any purpose for which similar powers are conferred by the Act is subject to restrictions of an entirely different nature, which we proceed now to consider.

6. **Sect. 63.**—By sect. 63 of the Act of 1882, sub-sect. (1), it is provided that any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of the Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether

absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons [*624] are so entitled *concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of that Act, are for the purposes of the Act trustees of the settlement. And by sub-sect. (2), in every such case the provisions of the Act referring to a tenant for life and to a settlement, and to settled land, are to extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject to certain exceptions not material to the present purpose.

Difficulties under the section.— This obscure section, which cannot but be regarded as a most unfortunate enactment, gave rise to many difficulties, and in many cases added considerably to the costs of administering trust estates by unnecessarily obstructing the free disposition by the trustees of property vested in them upon trust for sale. Thus, the effect of the section was, where the proceeds of sale, or any share of the proceeds of sale, were held in trust for a person or several persons concurrently, any of whom had a life or other limited interest, to render various consents necessary (a); and it was a question of difficulty whether, even where the first trust affecting the proceeds of sale was for payment of debts, and the residue only, or a share of such residue, was held in trust for persons in succession, such consents could be dispensed with, though the better opinion

[(a) In *Taylor v. Poncia*, 25 Ch. D. 646, a distinction was drawn between the case where there was an absolute trust for sale at a particular time, without any discretion in the trustees as to the time at which the sale should

take place, and the ordinary case of a trust for sale with a discretion in the trustees to postpone the sale, and it was held that in the former case the section did not apply, and the trustees could sell without any consent.]

seems to have been that such consents were in that case unnecessary.

Remedy provided by Settled Land Act, 1884. — It is not proposed, however, to discuss what consents were required under the section, as the inconveniences which arose from requiring any consents were found to be so serious, that the legislature intervened, and enacted by the Settled Land Act, 1884, sect. 6, sub-sect. (1), that in the case of a settlement within the meaning of sect. 63 of the Act of 1882, any consent not required by the terms of the settlement is not, by force of anything contained in that Act, to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or *powers [*625] created by the settlement. And by sub-sect. (3), the section applies to dealings before, as well as after, the passing of the Act. But sect. 7 provides that, with respect to the powers conferred by sect. 63 of the Act of 1882, the following provisions are to have effect: —

(1). Those powers are not to be exercised without the leave of the Court.

(2). The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

(3). The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(4). So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is, by the order, given to exercise a power conferred by the Act of 1882.

(5). An order under this section may be registered and reregistered, as a *lis pendens*, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

(6). Any person dealing with the trustees from time to

time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered, as a *lis pendens*.

(7). An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of sect. 63 of the Act of 1882.

(8). An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(9). The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by sect. 63 of the Act of 1882, and shall have, and may exercise those powers accordingly.

(10). This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

7. **Effect of enactments.** — The effect of these enactments is, that where property is *subject to a trust or direction for sale, as distinguished from a mere power of sale, the trustees may execute the trust, and exercise their powers irrespective of the restrictions arising under the Settled Land Act, 1882, until an order has been made by the Court giving leave to some other person or persons to exercise all or any of the powers conferred by sect. 63 on the tenant for life; and that until such an order has been made no tenant for life or other limited owner is able, under the Act of 1882, to exercise any power conferred by that Act. But when such an order has been made, and so long as the order remains in force, the trustees cannot execute any trust or power created by the settlement for any purpose to which the leave given by the order extends. The powers under the settlement and the Act will thus never be concurrent, and as every order to be effectual must be registered and re-registered as a *lis pendens*, there will never be any difficulty in ascertaining, by a search for *lites pendentes*,

whether the trustees are in a position to execute their trusts and powers. Moreover, as the persons to whom leave is given to exercise the powers "are to be deemed the proper persons to exercise them, and may accordingly exercise them," any person dealing with such persons will acquire a statutory title from them, and will not be under any obligation to ascertain that the leave was properly given.

8. **Instrument creating the trust.** — It has been held that, in determining whether land vested in trustees upon trust for sale is subject to the provisions of the Settled Land Act, 1882, the Court must look simply at the instrument which created the trust for sale, and that if at the time when a contract for sale is entered into by the trustees there is no person who, by virtue of the provisions of *that* instrument, is entitled to the income of the money arising from the sale, or of the land until sale, for his life or any other limited period, sect. 63 does not apply, notwithstanding that, under other instruments subsequent to that creating the trust for sale, there may be tenants for life or persons with other limited interests (*a*). The decision is no doubt a convenient one, but it seems to do considerable violence to the language of the Act, as it is conceived that the words "the instrument or instruments under which the *trust* arises" cannot be properly confined to the instrument or instruments under which the *trust for sale* arises, but must have been intended, and should be construed to extend to all the instruments which together create the *whole trust* affecting the property.]

[(*a*) *Re Earle and Webster's Contract*, 24 Ch. D. 144.]

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